No. 93-639-CSX
Status: GRANTED

Docketed:
October 25, 1993

Title: Silvia S. Ibanez, Petitioner
v.
Florida Department of Professional Regulation, Board of Accountancy

Court: District Court of Appeal of Florida, First District

Counsel for petitioner: Westmoreland,J. Lofton

Counsel for respondent: Nelson,Lisa S., Rimes,John J.

Entry	Date	Note	Proceedings and Orders
1	Oct 25 1993	G	Petition for writ of certiorari filed.
2	Nov 19 1993		Brief amicus curiae of American Association of Attorney-Certified Public Accounts filed.
3	Nov 24 1993		Brief amici curiae of International Board of Standards and Practices, et al. filed.
4	Nov 26 1993		Brief of respondent Florida Dept. of Business and Professional Regulation in opposition filed.
5	Dec 1 1993		DISTRIBUTED. January 7, 1994 (Page 2)
7	Jan 10 1994		REDISTRIBUTED. January 14, 1994 (Page 17)
8	Jan 14 1994		Petition GRANTED.
			**********
9	Feb 17 1994		Record filed.
		*	Original proceedings Florida Department of Business and Professional Regulation (BOX)
10	Feb 28 1994		Joint appendix filed.
11	Feb 28 1994		Brief of petitioner Silvia Ibanez filed.
12	Feb 28 1994		Brief amici curiae of Certified Financial Planner Board of Standards, et al. filed.
13	Feb 28 1994		Brief amicus curiae of American Association of Attorney-Certified Public Accounts filed.
14	Feb 28 1994		Brief amicus curiae of Florida Bar filed.
15	Feb 28 1994		Brief amici curiae of Alliance of Practicing Certified Public Accountants, et al. filed.
16	Mar 1 1994		Record filed.
		*	Original record proceedings District Court of Appeal, First District, State of Florida.
17	Mar 4 1994		CIRCULATED.
18	Mar 7 1994		SET FOR ARGUMENT TUESDAY, APRIL 19, 1994. (1ST CASE).
19	Mar 30 1994	X	Brief of respondent Florida Dept.of Professional Regulation Board of Accountancy filed.
20	Mar 31 1994	X	Brief amicus curiae of American Institute of Certified Public Accountants filed.
21	Mar 31 1994	X	Brief amicus curiae of Florida Institute of Certified Public Accountants filed.
22	Apr 11 1994	X	Reply brief of petitioner Silvia Ibanez filed.
23	Apr 19 1994		ARGUED.

93-639

Supreme Court, U.S.
FILED
OCT 25 1993
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1993

SILVIA S. IBANEZ,

Petitioner,

v.

STATE OF FLORIDA,
DEPARTMENT OF PROFESSIONAL REGULATION,
BOARD OF ACCOUNTANCY,

Respondent.

Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida For The First District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. WHETHER THE FLORIDA BOARD OF ACCOUNTANCY'S BLANKET BAN ON AN ATTORNEY/CPA'S TRUTHFUL AND VERIFIABLE USE OF THE APPELLATIONS, "CPA" AND "CFP," ON BUSINESS CARDS, LETTERHEAD, AND TELEPHONE BOOK LISTINGS, VIOLATES THE ATTORNEY'S FIRST AMENDMENT RIGHT TO COMMERCIAL SPEECH.

PARTIES TO THE PROCEEDING

The following party was the Plaintiff below and is the Respondent before this Court:

State of Florida, Department of Professional Regulation, Board of Accountancy

The following party was the Defendant below and is the Petitioner before this Court:

Silvia S. Ibanez

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No. _____

In The

Supreme Court of the United States

October Term, 1993

SILVIA S. IBANEZ,

Petitioner,

v.

STATE OF FLORIDA,
DEPARTMENT OF PROFESSIONAL REGULATION,
BOARD OF ACCOUNTANCY,

Respondent.

Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida For The First District

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Silvia S. Ibanez ("Ibanez" or "Petitioner"), respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the District Court of Appeal of Florida, First District, entered in this proceeding on June 9, 1993.

OPINIONS BELOW

The opinion of the Florida District Court of Appeal, dated July 28, 1993, denying Petitioner's Motion for Rehearing is reprinted at Appendix A, App. 1a. The order

of the Florida District Court of Appeal affirming, without opinion, the Florida Board of Accountancy ("Board") order was issued on June 9, 1993, and is unreported. It is reprinted at Appendix A, App. 2a, together with the Court's order denying attorney fees of the same date, at App. 3a. The opinion which was affirmed by the District Court of Appeal is the April 23, 1992, Order of the Board, also unreported, and reprinted at Appendix D, App. 4a. The Board's order, in turn, includes references to the finding of fact embodied in the recommended order of the Hearing Officer of the Florida Department of Administrative Hearings issued on January 15, 1992. It is unreported and reprinted at Appendix E, App. 22a.

JURISDICTION

The Order of Affirmance of the Florida District Court of Appeal, First District, was entered on June 9, 1993. Petitioner timely filed a Motion for Rehearing on June 23, 1993. On July 28, 1993 the First District Court of Appeal denied the Motion for Rehearing. That order is reprinted at Appendix A.

Jurisdiction of this Court to review this case on Certiorari rests on 28 U.S.C. Section 1257(a). Because the First District Court of Appeal elected not to write an opinion, the Supreme Court of Florida was without jurisdiction to review this case and the First District Court of Appeal is the highest Florida state Court in which a decision could be had. Fla. Const. Art. V Section 3(B)(3); Florida Supreme Court Manual of Internal Operating Procedures

II A1.(A); *Jenkins v. State* 385 So.2d 1356 (Fla. 1980); *Palmore v. Sidoti*, 466 U.S. 429 (1984).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution reprinted in Appendix I to this Petition.

STATEMENT OF THE CASE

A. INTRODUCTION

Petitioner is a practicing attorney, a member of the Florida Bar, and holds an active Florida CPA license in good standing. She is also a registered advisor with the Florida Division of Securities, as well as a certified financial planner ("CFP").

The CFP certification is conferred by the International Board of Standards and P ctice for Certified Financial Planners ("IBCFP"), a national organization.

The language in Petitioner's CPA certificate specifically authorizes her to display her CPA credentials:

> " . . . has passed all examinations and has met all other requirements prescribed by law and by rule of this Board for certification as an expert public accountant, and *is therefore entitled to append the letters CPA after this registrant's name to evidence registration by this Board as a certified public accountant.*" App. 26a.

As an active-licensed CPA, Petitioner is authorized to perform the attest function, known as auditing; she can also prepare financial statements or be associated with financial statements, perform tax return preparation services, perform estate, tax or financial planning services, perform all types of general accounting and bookkeeping activities, represent clients in IRS audits, perform management consulting services, and provide EDP/computer consulting services; perform litigation consulting services (i.e., expert witness); value closely held businesses, among other activities.[1]

Petitioner currently operates as a sole practitioner of law and provides legal services for her clients not provided by CPAs. As a tax attorney, part of her normal professional activities, includes tax opinion work, representation before the Internal Revenue Service, evaluation of the tax consequences of certain transactions, as well as financial and estate planning. In doing so, she utilizes both her legal education, training, and experience and her education, training and experience as a CPA.[2]

Petitioner does not perform the attest function of a public accountant, i.e., she does not audit, which all parties agree is the only function which rests exclusively with CPAs.[3]

Upon receiving an anonymous mailing of an attorney yellow pages sheet, Appendix F, with Petitioner's name which had the credentials "CPA" and "CFP" after her

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[1] Pursuant to Sec. 473.302(4) Fla. Stat.

[2] See Finding No. 11 at App. 27a.

[3] See Finding No. 15 at App. 28a.

individual name, the Board initiated disciplinary proceedings against her. In essence, the Board alleged:

> COUNT I: Petitioner is misleading the public by using the CPA credential in connection with her law firm, "SILVIA S. IBANEZ, P.A."
>
> COUNT II: Petitioner's use of the CFP credential in the attorney yellow pages and on her law practice business card, Appendix G at App. 54a, constitutes false and misleading advertising of the practice of public accounting.
>
> COUNT III: Petitioner's use of the CPA credential in the attorney yellow pages misleads the public into believing that she has complied with the Board's regulations and related Florida statutes.[4]

B. OPINION OF THE BOARD

The Board reprimanded Petitioner solely because she appended the credentials "CPA" and "CFP" after her name in the "attorney" section of the telephone yellow pages. [See exhibit of the advertisement at Appendix F.] The Board found this listing to constitute "improper use" or misleading use of the credential, "CPA" (App. 15a) and "inherently misleading" advertising, as to the use of "CFP." App. 19a. Moreover, the Board found the use of

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[4] These counts are summarized from the record, but are explained in depth at App. 23a, and again at App. 45a, 46a and 47a. In turn, the rules and statutes cited therein have been reproduced at Appendix I, App. 59a to 68a, specifically Sec. 473.323(1)(a)(f)(g)(h), Fla. Stat. and Rules 21A-20.011, 21A-20.012 and 21A-24.001 F.A.C.

CFP to be "false, deceptive, and misleading advertising" App. 20a.

Under the Florida Administrative Procedure Act, a formal administrative hearing was held before an impartial hearing officer, pursuant to Sec. 120.57(1) Fla. Stat. Such a hearing is in the nature of a trial. The hearing officer's findings are important in evaluating this Petition for certiorari.

The first "expert" called by the Board was Mr. Louis Dooner, the same expert used by the Board in *Edenfield v. Fane*, 507 U.S. ___, 123 L.Ed.2d 543, 113 S. Ct. ___ (1993). Mr. Dooner testified that Petitioner's use of the CPA designation on her attorney business card tells the public that she is offering to perform CPA services. App. 27a. He did not substantiate his conclusion with empirical studies or surveys. The hearing officer did not find credible the Board's witness, Department of Professional Regulation employee, Elise Rice (App. 30a); and the Board's other witness, Ms. Martha Willis, Executive Director of the Board, could not explain why the Board deems CFP to be a specialty of public accounting. App. 32a. Petitioner presented the expert witness, Mr. Robert Goss, who is the Executive Director of the IBCFP. The hearing officer concluded, based on the evidence, that the CFP designation is not a specialty of public accounting. App. 47a-48a.

Upon reviewing the type of professional services Petitioner renders, the Board conceded that Petitioner does not render "attest" services. "Attest" services are the only ones exclusively within a CPA's domain. The Board also agreed that many other CPA activities overlap with

activities performed by other non-CPA professionals, presumably including attorneys, App. 6a.

The hearing officer, at the conclusion of the administrative trial and after considering factual and legal arguments presented by the Petitioner and the Board, issued a recommended order that the complaint filed against Ibanez be dismissed.[5]

In reaching her conclusion that the use of the truthful credentials "CPA" and "CFP" were not misleading and did not constitute deceptive advertising, as alleged by the Board, the hearing officer made these factual findings:

> *"Paragraph 13:*
>
> Truthful use, communication, or disclosure of the CPA credential by an actively licensed CPA does not per se constitute false, misleading, or deceptive advertising. The evidence does not support a finding that withholding truthful disclosure that one has earned the CPA credential benefits the public welfare or effects the purposes of the enabling legislation, or indeed, how such nondisclosure could promote them, particularly since it has been shown that persons of considerably lesser competency and achievement levels in the discipline of accounting may legally offer to the public almost all the services provided by CPAs.

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[5] Under the Florida Administrative Procedure Act, *supra*, the hearing officer's order is forwarded to the regulatory board in question, to be followed or rejected, wholly or partly. In this case, the regulatory board is the Florida Board of Accountancy, under the Department of Professional Regulation ("DPR").

"Paragraph 14:

> The use of the term "CPA" implies a specific competency to the public. The fact that Ibanez is a CPA is valuable to her legal clients. CPA status is a valuable property right to each CPA, and the ability of a practicing attorney to publicize the fact that s/he holds an active CPA license is a valuable asset to that individual. See App. 28a and 30a.

Based on the findings of facts and conclusions of law, the hearing officer advised the Board to dismiss all charges because Ibanez is not practicing public accounting. Alternatively, the hearing officer concluded that even if Ibanez were considered to be practicing public accounting, none of the counts against her were proven. App. 48a and 49a.

Upon rejecting the hearing officer's order, the Board of Accountancy[6] stated several conclusions:

1. Although there is a general exclusion from the Board's jurisdiction over certain CPAs, as an attorney, Petitioner does not come within the exclusion because she deals with the public. Footnote 3 at App. 8a.

2. Petitioner's failure to license her law firm as a CPA firm is regarded as tantamount to being an "unlicensed"[7] CPA. App. 11a.

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[6] Per Sec. 473.303, Fla. Stat., a majority of the Board members are CPAs who practice public accounting as their primary occupation.

[7] Though the Board's order vaguely suggests that Petitioner is "unlicensed" because her law firm is unlicensed, this point is moot because the "unlicensed firm" allegation was withdrawn. Paragraph 22 at App. 45a.

3. The Board characterized Petitioner's truthful disclosure of her CPA credential as an "inducement" and "inherently misleading," rather than of benefit to the public. App. 15a.

These conclusions, although unsupported by the record or by any reasoning, form the basis for the Board's finding that Petitioner's attorney advertising, which is concededly commercial speech, is false and misleading and must be banned. App. 19a and 20a.

The Board, in an obvious effort to prevent non-practicing CPAs from letting the consumer public know of such professionals' qualifications, found that the public in Florida could be misled by Petitioner's use of her CPA credential in the attorney yellow page listing. According to the Board, Ibanez's mere disclosure of the CPA and CFP credentials in her attorney yellow page listing conveys two messages to the public: 1) that she is subject, now, to the technical standards for the practice of public accounting promulgated by the Board, and 2) that she will continue to comply, in the future, with the Board's regulations.[8] Thus, a simple disclosure of credentials was converted into a complex regulatory determination, which also rests on speculation. As to the use of the CFP

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[8] Implicitly, the Board speculated that, as an attorney, Ibanez will not always be in compliance with its regulations, in the future, and this hypothetical event is the cause for disciplining Ibanez now. The Board uses the example of contingency fees, which attorneys customarily accept, but are prohibited under Chapter 473, Fla.Stat. See Footnote 2. at App. 6a.

credential, the Board issued its order finding Ibanez guilty of deceptive advertising after conducting a constitutional analysis under the case of *Central Hudson Gas and Electric Corp. v. Public Comm'n of New York*, 447 U.S. 557 (1980). This analysis resulted in the Board concluding that:

> " . . . it is apparent that Respondent [Petitioner herein] has advertised the fact that she is a CFP or Certified Financial Planner, which, in the context of an individual practicing public accounting and trading on the fact that she is a certified public accountant, has been determined by the Board to be false, deceptive and misleading advertising by implying a specialty of public accountancy, not recognized by the Board of Accountancy." App. 20a.

The Board then imposed its reprimand, with the imposition being stayed until "any appellate proceedings" were completed.

C. ORDER OF THE APPELLATE COURT

Petitioner appealed the Board's order to the District Court of Appeal, First District of Florida, which affirmed the Board's decision, without opinion, on June 9, 1993. Thereupon, Petitioner filed a request for rehearing which was denied on July 28, 1993. These orders are reprinted at Appendix A and B, respectively.[9] On September 23, 1993, Petitioner requested the Board to stay her reprimand

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[9] The Appellate Court's order denying attorney fees, App. C, accompanied the Per Curiam order.

pending the disposition of her Petition for Certiorari; her motion was denied.

HOW THE FEDERAL QUESTION WAS RAISED AND PASSED ON

Upon being served with an administrative complaint on June 13, 1991, Petitioner filed a response on July 12, 1991, and raised various affirmative defenses. The principal constitutional issue was:

> *"Paragraph 13.* Ibanez's disclosure in the phone book that she is certified as a CPA and financial planner is disclosure of nonmisleading, truthful, constitutionally protected commercial speech."

Subsequently, DPR filed an Amended Administrative Complaint on July 30, 1991, which Petitioner responded to on August 26, 1991, and wherein the same affirmative defense was again reiterated. On January 15, 1992, Hearing Officer Ella Jane P. Davis issued a recommended order finding no wrongdoing on the part of Petitioner without reaching the federal questions.

The Board's order finding fault with Petitioner included discussion of commercial free speech protection, and whether it should be afforded to Petitioner under the First Amendment and relevant case law.

Petitioner's appellate briefs to the Florida District Court of Appeal, First District, reiterated previously asserted affirmative defenses, including the First Amendment violation discussed herein, as well as violations of her due process and equal protection rights. Petitioner also asserted that the Board's restriction on Petitioner's truthful use of her CPA and CFP credentials violates

Federal laws, is anti-competitive, and interferes with interstate commerce. The First District Court of Appeal issued a PER CURIAM decision, without opinion.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS WHICH PROHIBIT BLANKET SUPPRESSION OF COMMERCIAL FREE SPEECH.

The decision below constitutes a blanket ban on commercial speech. The Board of Accountancy reprimanded Petitioner for truthfully appending CPA and CFP to her name in advertisements and on her letterhead and business cards. The effect of this decision is to suppress Petitioner, and others who hold multiple professional credentials, from advertising the true fact that in addition to being an attorney, she is also a certified public accountant and certified financial planner.

A. Importance Of Commercial Speech

This Court has construed the First Amendment to protect truthful descriptions of the price and terms of routine legal services. See *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). This Court has also recognized First Amendment protection for speech concerning the ability of professionals rendering services. For example, in *Re R.M.J.*, 455 U.S. 191 (1982), this Court struck down certain advertising restrictions promulgated by the Missouri Bar including bans on describing areas of practice, listing

Courts and states in which the lawyer had been admitted to practice, and the wide-scale mailing of announcement cards.

In *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91 (1990), this Court overturned the public censure of an attorney by the Illinois Supreme Court where the attorney had used the letterhead claiming certification as a trial specialist by the National Board of Trial Advocacy.

Recently, in *Edenfield v. Fane*, 507 U.S. ___, 123 L.Ed.2d 543, 113 S. Ct. ___ (1993), these protections were extended to certified public accountants. Under the First Amendment, as confirmed by prior decisions of this Court, Petitioner is entitled truthfully to advertise and communicate truthful, non-deceptive information. These are types of commercial expression to which the protections of the First Amendment apply. *Edenfield v. Fane, supra.*

This Court's general approach for determining the constitutionality of restrictions on commercial speech, including the commercial speech of attorneys, is set forth in *Central Hudson Gas and Electric Corp. v. Public Comm'n*, 447 U.S. 557, 564 (1980). Under that test, commercial speech is entitled to constitutional protection if it is "neither misleading nor related to unlawful activity". If the communication meets that threshold test, it may then be restricted only if (a) the government asserts a substantial interest to be achieved by the restrictions, (b) the restrictions directly advance the government's asserted interest, and (c) the restrictions are no more extensive than is reasonably necessary to effectuate that interest. *Central Hudson* at 564 and 566.

B. Petitioner's Expressions Are Truthful

In *Peel, supra,* the attorney stated on his letterhead that he was certified as a trial specialist by the National Board of Trial Advocacy. 496 U.S. at 92, 93. This Court observed that the facts stated on the letterhead were true and verifiable. Additionally, this Court noted that there was no contention that any potential client or person was misled or deceived by Peel's stationery. 496 U.S. at 100.

The Florida Board of Accountancy acknowledged that Petitioner was indeed both a CPA and CFP. Furthermore, the Board acknowledged that Petitioner's CPA certificate states that she is entitled to append the letters CPA after her name to evidence registration by the Board of Accountancy as a certified public accountant.[10] Therefore, Petitioner's advertisement that she is a CPA and a CFP is true and verifiable. As such, it is not subject to blanket suppression by the Board.

C. Petitioner's Advertising That She Is A CPA And CFP Is Not Potentially Misleading

In this Court's decision in *Re R.M.J.*, 455 U.S. 191, the Court stated that although truthful advertising is entitled to the protections of the First Amendment,

> " . . . when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the

[10] In the Board's Final Order, it acknowledges the Hearing Officer's findings of facts to this effect. See Order at App. 5a, [at App. 26a].

> States may impose appropriate restrictions. 455 U.S. at 203.

In this case, the Board of Accountancy found that Petitioner's use of the appellation "CPA" was inherently misleading.[11] However, Petitioner is, in fact, a licensee subject to the rules of the Board of Accountancy. The Board's vague concern regarding the fact that Petitioner's law practice professional association is not licensed as a public accounting firm has no bearing whatsoever on the fact that Petitioner is a certified public accountant entitled to advertise that fact. Equally abstract is the Board's concern that some member of the public might think that Silvia S. Ibanez, P.A., printed on her law firm's letterhead [see Exhibit at Appendix H at App. 55a], is a licensed public accounting firm. These concerns do not render Petitioner's use of the appellation "CPA", after her individual name, misleading.

D. The Board Has No Substantial Interest In Totally Suppressing Petitioner's Advertising Of Her CPA And CFP Credentials

The state must assert a substantial interest and the interference with speech must be in proportion to the interest served. *Re R.M.J.*, 455 U.S. at 203, citing *Central Hudson Gas and Electric Corp. v. Public Comm'n*, 447 U.S. 557, 563, 564 (1980). Although the Board of Accountancy

[11] Because potential clients "would clearly see respondent's use of the titles "CPA" in her advertisements as an inducement to contact Petitioner and seek her services thinking that she was a licensee subject to the rules of the Board of Accountancy (Board Opinion, App. 15a).

asserts that it is obvious that the regulation of the practice of public accountancy is a valid governmental interest, it is the blanket ban (not the regulation) which must pass muster on this second prong of the test. Here, the Board has failed to identify any substantial interest in a rule that prohibits a CPA from advertising the fact that she is a CPA. Similarly, in *Re R.M.J.*, this Court found that the advisory committee failed to identify any substantial interest in a rule that totally prohibits a lawyer from identifying the jurisdiction in which he is licensed to practice. The Court stated that such information was not misleading on its face but was instead, factual and highly relevant information. 455 U.S. at 205.

Applying *Central Hudson* to this case, it is apparent the Florida Board of Accountancy has failed to satisfy the second prong. At this point, the Court's analysis may cease because the rest of the *Central Hudson* test is contingent on there being a "substantial government interest" asserted. Such an interest is lacking here. However, the analysis will continue assuming, arguendo, that this Court were to find there is a substantial government interest.

E. The Board's Total Ban Of Petitioner's Advertising Does Not Advance The State's Interest

The third prong of the *Central Hudson* test is whether the regulation directly advances the governmental interest asserted. *Central Hudson*, 447 U.S. at 566. The Florida Board of Accountancy asserted that their blanket ban would ensure "that only an individual who meets certain standards is permitted to call oneself a CPA." App. 13a.

Yet, Petitioner has met all standards which permit her to call herself a CPA.

Most recently in the *Edenfield* case, this Court stated the burden of restricting commercial speech is not satisfied by –

> "mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, at 123 L.Ed.2d 543, 555.

In this case, the Board did not, in its Order, identify a single individual who had been misled by Petitioner's advertisement of the appellations CPA and CFP. The hearing officer noted that the Board failed to prove that any consumer in Florida had been misled by Petitioner's advertisements. App. 32a. The Board's primary witness was Louis Dooner. Mr. Dooner's conclusionary statement was nothing more than "conjecture" as to the effect of Petitioner's use of CPA designation on the public. In *Edenfield, supra*, at 556, this Court rejected his testimony because it was based on conjecture. Mr. Dooner's testimony in this case is similarly objectionable.[12] Ms. Martha Willis, Executive Director of the Board, could also not identify any party who had been misled by Petitioner. The Board's third witness, Ms. Elise Rice, was not found to be credible. Arguendo, if she were, Ms. Rice did not connect CFP as a specialty of public accountancy. App.

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[12] It is significant that the Board would use the same "expert" to suppress the First Amendment rights of attorneys/CPAs, as it used to suppress First Amendment rights of CPAs.

30a. Nor did the Board identify a single study or empirical data to substantiate its abstract concerns. [Finding #25 at App. 32a]

In light of the foregoing, the conclusion that Petitioner misled anyone was mere "speculation" which this Court in *Edenfield* held to be insufficient to satisfy the burden of justifying a restriction on commercial speech. Accordingly, the third prong of the *Central Hudson* test was not satisfied by the Board of Accountancy.

F. The Board's Order Was More Extensive Than Necessary

The last prong of the *Central Hudson* test is whether the State's restrictions are more extensive than is necessary to achieve the state's interest. *Central Hudson*, 447 U.S. at 566. As the Court explained in *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989), while this last prong of the *Central Hudson* test does not require the state to use the least restrictive means to achieve its interest, it does require the state to employ "a means narrowly tailored to achieve the desired objective." 492 U.S. at 469, 480. The Board found that because Petitioner's use of the appellation "CPA" was inherently misleading that the "Board's position that a CPA must comply with the statutes and rules when trading upon the fact of licensure as a CPA, constitutes a 'reasonable fit' for constitutional purposes". App. 15a-16a.

The Board conducted no in-depth analysis under *Central Hudson* with respect to Petitioner's use of the appellation "CFP". Instead, the Board concluded that Petitioner's use of the designation "CFP" was inherently

deceptive and misleading advertising by implying a specialty of public accountancy not recognized by the Board of Accountancy, App. 20a.

These conclusions are directly contrary to this Court's ruling in *Edenfield*, which held that where the prohibitions do not serve the purposes of the state in a direct and material manner, the restriction "cannot be, by definition, a reasonable time, place, or manner restriction." *Edenfield, supra,* at 557. Accordingly, because the Board's restriction on Petitioner's speech lacks a substantial relationship to the governmental interested asserted, it is not necessary for this Court to consider the fourth prong of the *Central Hudson* test.

Clearly, the order of the Board demonstrates that no consideration whatsoever was given to employing "means narrowly tailored to achieve the desired objective", other than a total suppression of Petitioner's advertising the CPA and CFP marks. The final prong of the *Central Hudson* test was not satisfied by the Board of Accountancy because the ban imposed by the Board cannot be held to advance the Board's interest.

In light of the foregoing, the Board's absolute prohibition of Petitioner's speech in the form of a reprimand by the Board of Accountancy, does not meet *Central Hudson's* requirements for permissible restriction of First Amendment commercial free speech.[13] Thus, the Board's

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[13] In its Order, the Board relied upon the Eleventh Circuit decision of *Abramson v. Gonzalez*, 949 F.2d 1567 (11th Cir. 1992) but misunderstands or misapplies the ruling therein. *Abramson* supports Petitioner's argument – "As long as commercial

order is in conflict with all of this Court's decisions on commercial free speech.

IMPORTANCE OF QUESTION PRESENTED

In *Peel*, 496 U.S. 91, 111, n. 18, this Court noted that a principal reason why consumers do not consult lawyers is "because they do not know how to find a lawyer able to assist them with their particular problems." Citing Federal Trade Commission, Staff Report on *Improving Consumer Access To Legal Services: The Case For Removing Restrictions On Truthful Advertising* (1984). The Court also noted that information about certification and specialties facilitates consumers' access to legal services and thus better serves the administration of justice. *Re R.M.J.*, 455 U.S. at 199, 200.

The Petitioner defended the disciplinary charges in this case on the additional grounds of, *inter alia*, substantive due process as well as equal protection. Although the Board of Accountancy did not rule on these issues and restricted its decision to First Amendment grounds, there can be no question that the effect of reprimanding Petitioner for advertising that she is a CPA and a CFP has grave implications for the entire legal profession. Already there are attorneys who are also certified public

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speech describes lawful activity and is truthful and not fraudulent or misleading, it is entitled to the protections of the First Amendment." at 1575.

accountants who are being singled out in various states,[14] and are understandably hesitant to advertise their credentials for fear of being disciplined. Consequently, prospective clients will not know which attorneys have specific skills which are pertinent to their legal problem. The effect of this is a prophylactic ban on professionals disclosing and advertising their credentials and skills, all to the detriment of the public.

Another major problem which is engendered by a decision, such as the one for which Ibanez seeks review, is the fact that among the various states, the Boards of Accountancy undoubtedly decide on a case by case fashion, whether attorneys are allowed to advertise the fact of their licensure as a certified public accountant and a certified financial planner. This undoubtedly results in attorneys being able to advertise their CPA licensure in some states, but not others. This will result in inconsistency and confusion throughout the country on this question.

In fact, the evidence in this case indicated that the Florida Board of Accountancy, itself, rendered inconsistent decisions on which attorneys are permitted to advertise the "CPA" appellation. For example, some attorney/

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[14] See Article entitled, **"ASSOCIATION TO BACK ATTORNEY-CPAS IN FIGHT AGAINST BOARDS OF ACCOUNTANCY"**, *THE ATTORNEY-CPA*, newsletter issue Vol. XXIII, Number 4, dated August/September, 1987, which involve disciplinary complaints leveled against Texas Attorney-CPA Thomas W. McCulloch, and Florida Attorney-CPA, Leonard G. Weisberg.

CPAs have been granted the right to use their credentials[15] and others[16], like Petitioner, have been denied.

In fact, it is ironic that the April 1993 issue of the *Florida CPA Today* magazine, published by the Florida Institute of Certified Public Accountants ("FICPA") features an article written by one Daniel J. Gibby, who has stated in biographical information accompanying his article that he is a "JD, CPA." (at page 10) Like Gibby, Petitioner submitted biographical information, i.e., CPA, CFP, to accompany her article, in the same magazine. Yet, it is difficult to reconcile the suppression of Petitioner's CPA and CFP credentials from Petitioner's name when the magazine published her article in its issue of *Florida CPA Today* dated April, 1992. Obviously, all CPAs in Florida are not treated equally. Though the magazine cited is published by the Florida Institute of CPAs, its editorial actions understandably mirror the confusing and arbitrary posture taken by the State's regulatory agency, the Florida Board of Accountancy.

It must be emphasized that no statute, rule, or regulation prohibited Petitioner from advertising that she is a CPA and CFP. Nevertheless, she was in fact reprimanded for doing so. In *Hynes v. Major of Oradell*, 425 U.S. 610 (1976), this Court held that:

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as

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[15] Per Official Board Opinion to Attorney/CPA Steinman on April 12, 1988, at page R-339 of the Appellate Record.

[16] Per Official Board Opinion to Attorney/CPA Damitz on February 2, 1988, at page R-336 of the Appellate Record.

> to what the state commands or forbids". at 621-622.

In *Hynes*, a non-commercial speech case, the Court held that the law in question "may trap the innocent by not providing fair warning." Nor did the ordinance "provide explicit standards for those who apply." 408 U.S. at 622. Without any consistency in how the various boards of accountancy would decide this issue, the question as to whether an attorney may advertise his CPA and CFP appellation is a matter of national significance with attorneys throughout the country potentially falling into a trap for the unwary.

CONCLUSION

The Board's absolute ban on Petitioner's advertising of her credentials conflicts with the First Amendment and with all interpretative decisions of this Court. For these reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

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*Counsel of Record

October 22, 1993

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904) 488-6151

July 28, 1993

CASE NO: 92-01994

L.T. CASE NO.
91-4100

Silvia S. Ibanez — v. State of Florida, Dept. of Professional Reg.

Appellant(s), — Appellee(s).

BY ORDER OF THE COURT:

Appellant's motion for rehearing filed, June 23, 1993, is hereby DENIED.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

/s/ Jon S. Wheeler
JON S. WHEELER, CLERK
By: Rhonda Causseaux
Deputy Clerk

Copies:
Silvia S. Lbanez
Lisa S. Nelson
Kathryn L. Kasprzak
J. Lofton Westmoreland
Charles F. Tunnicliff
Robin Harmon, Clerk

[SEAL]

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

SILVIA, S. IBANEZ,

Appellant,

v.

STATE OF FLORIDA, DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF ACCOUNTANCY,

Appellee.
_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 92-1994.

Opinion filed June 9, 1993.

Appeal from an order of the Department of Professional Regulation.

Silvia S. Ibanez, P.A., Winter Haven and J. Lofton Westmoreland, of Moore, Hill & Westmoreland, Pensacola, for appellant.

Lisa S. Nelson, Assistant General Counsel, Tallahassee, for appellee.

PER CURIAM.

AFFIRMED.

ZEHMER, BARFIELD, and MICKLE, JJ., CONCUR.

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904) 488-6151

June 9, 1993

CASE NO: 92-01994

L.T. CASE NO.
91-4100

Silvia S. Ibanez v. State of Florida, Dept. of Professional Reg.

Appellant(s), Appellee(s).

BY ORDER OF THE COURT:

Appellant's motion for attorney's fees is denied.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

/s/ Jon S. Wheeler
JON S. WHEELER, CLERK
By: Laurie Black
Deputy Clerk

[SEAL]

Copies:
Silvia S. Lbanez
Lisa S. Nelson
Ka[illegible]n L. Kasprzak
J. Lofton Westmoreland
Charles F. Tunnicliff

STATE OF FLORIDA
DEPARTMENT OF PROFESSIONAL REGULATION
BOARD OF ACCOUNTANCY

STATE OF FLORIDA, DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF ACCOUNTANCY,

Petitioner,

vs.

SILVIA IBANEZ,

Respondent.

_____/

DOAH CASE NO. 91-4100
DPR CASE NO. 90-13805

FINAL ORDER OF THE BOARD OF ACCOUNTANCY

(Filed May 12, 1992)

THIS CAUSE came on before the Florida Board of Accountancy at a regularly scheduled meeting on April 23, 1992 in Tampa, Florida pursuant to a Proposed Recommended Order of Hearing Officer, Ella Jane P. Davis dated January 15, 1992. The Board, noting that no exception [sic] have been filed and after reviewing the complete record, including all exhibits, hereby enters this Final Order of the Board of Accountancy.

FINDINGS OF FACT

The Board after a complete review of the record and the transcript of the hearing in the above-style cause,

hereby accepts the Proposed Findings of Fact of the Hearing Officer as set forth in her Recommended Order of January 15, 1992, with the exception of the following:

The second sentence of paragraph 7, and paragraphs 13, 21 and 23 of the Proposing [sic] Findings of Fact are legal conclusions and should not properly be in the Proposed Finding of Fact and are therefore struck. As to Proposed Finding of Fact No. 24, the next to the last sentence is partially incorrect, insofar as the Board has adopted a rule (Rule 21A-24.001(1)(g)-(j) [specifically Rule 21A-24.001(1)(i)]) setting forth, in rule form, the Board's policy as to the use of the term "certified" and its relationship to false, fraudulent, deceptive and misleading advertising. As such therefore, for purposes of the disciplinary action, neither the Department of Professional Regulation, nor the Board of Accountancy (which is a nominal party to the disciplinary action) is required to prove up the rationale for that rule. Paragraph 27 is struck as a legal conclusion inappropriately found in the Proposed Findings of Fact.

CONCLUSIONS OF LAW

The Conclusions of Law of the Hearing Officer in her Recommended Order of January 15, 1992 erroneously misapply the provisions of Chapter 473, F.S., and Chapter 21A, F.A.C., as well as misanalyze applicable provisions of the United States Constitution relating to regulations on commercial speech. In light of the foregoing, the Board of Accountancy is compelled to reject the Conclusions of Law of the Hearing Officer, and to substitute the following.

I

Initially it should be noted that, with the exception of the attest function,[1] all other activities of certified public accountants are activities which are not prohibited to any non-CPA in the State of Florida. As a result, with the exception of the attest function, Chapter 473, F.S., is a "Title Act." To the extent that Chapter 473 is a Title Act, its sole purpose is to provide consumers with the knowledge that if they use a CPA's services, and those services are within the practice of public accounting, as defined in Section 473.302(4), F.S., that a CPA will be subject to technical, educational and other standards promulgated by the Florida Legislature and the Board of Accountancy. Further, a consumer is assured that the CPA will adhere to certain regulatory requirements deemed necessary by the Legislature of the State of Florida to assure the independence, objectivity and integrity of the CPA.[2]

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[1] The attest function is defined as the independent opining on the truth and accuracy of financial statements, and is a function which is specifically permitted only to certified public accountants, see Section 473.322(1)(c), F.S.

[2] Including *inter alia*, Section 473.315,F.S., and Rule 21A-22, technical standards mandated by the legislature and promulgated by the Board of Accountancy; prohibitions on commissions and contingent fees, Section 473.3205, and 473.31, F.S.; requirements that a CPA not violate any of the disciplinary provisions of Chapter 473.323 and Rule 21A-36, that a CPA's practice will comply with the licensure of partnerships corporations, and rules promulgated thereunder, see Section 473.309, and 473.3101, F.S. All of the foregoing are in addition to 473.322(1)(b), F.S., which requires that any individual using the term "CPA" in the State of Florida must hold an active license (including meeting all continuing education requirements) from the Board of Accountancy.

As was noted in *Abramson v. Gonzalez*, 949 F.2d 1565 (11th Cir. 1992), as well as *Smith v. California*, 336 F.2d 530 (9th Cir. 1964), the function of a Title Act is not to preclude individuals who *are not* licensed from performing a certain set of tasks, but rather to let the public know that those individuals who *are* licensed have met, and continue to meet, the standards set out by the legislature and the appropriate regulatory boards through statutes and rules.

In light of the foregoing, it is necessary to address what, under Florida Statutes, is the practice of public accountancy. The provisions of Section 473.302(4), F.S. define the practice of public accountancy as follows:

> "Practice of," "practicing public accountancy," or "public accounting" means:
>
> (a) Offering to perform or performing for the public one or more types of services involving the use of accounting skills, or one or more types of management advisory of consulting services, by a certified public accountant, or firm of certified public accountants, of this state, including the performance of such services in the employ of another person; or (b) Offering to perform or performing for the public one or more types of services involving the use of accounting skills, or one or more types of management advisory or consulting services, by any other person holding himself or itself out as a certified public accountant or a firm of certified public accountants, including the performance of such services by a certified public accountant in the employ of a person so holding himself or itself out.

> However, these terms shall not include services provided by the American Institute of Certified Public Accountants or the Florida Institute of Certified Public Accountants, or any full service association of certified public accounting firms whose plans of administration have been approved by the board, to their members or services performed by these entities in reviewing the services provided to the public by members of these entities.

The Board of Accountancy has further refined the term in question through the promulgation of both Rule 21A-20.011, F.A.C,[3] excluding certain activities from the practice of public accountancy," and Rule 21A-20.012, F.A.C.,[4]

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[3] This rule was promulgated to exempt certain activities of CPAs, from the practice of public accountancy either when those CPAs are not, in fact, offering accounting services to the public, but only to their employer, or when they are not associated with financial statements and/or when they are not holding themselves out as certified public accountants. The rule was promulgated in order to address the concerns raised in *Cenac v. Florida State Board of Accountancy*, 399 So.2d 1013 (Fla. 1st DCA 1981). In *Cenac*, the First District Court of Appeal clearly indicated that to define the practice of public accountancy so as to foreclose the use of the broad range of accountancy skills to CPAs who do not trade on the fact of their licensure through advertising or public display of the appellation "CPA," and who are not engaged in the preparation of financial statements, could result in an unconstitutional and unreasonable attempt to regulate and prohibit activities of individuals who happen to hold licenses as CPAs, but who do not trade on the fact of their licensure as CPAs.

[4] This rule has recently been declared invalid, see *Ibanez et al., v. State Board of Accountancy et al.*, DOAH Case No. 91-3336R, Opinion rendered January 15, 1992. Appeals pending before the First District Court of Appeal Case Nos. 92-439, 92-440. While

defining the term "holding out" which is contained in Section 473.302(4)(b), F.S.

To the extent therefore, however, that a CPA is providing one or more types of accounting skills and management advistory [sic] services to the public, and at the same time holding himself or herself out as a CPA, such an individual is practicing public accounting. Any other construction of the definition of the practice of public accounting would permit individuals, engaged in offering accounting services to the public and holding the CPA license, to trade upon the fact of their licensure, and to advertise that fact, while not being subject to the statutes and rules governing CPAs in the State of Florida. It is difficult to conceive how, to the extent Chapter 473 is a Title Act, it could legitimately be said to protect the public health, safety and welfare, if individuals who trade on that Ti‘le in commerce while using their accounting skills for the public, are not subject to the jurisdiction of the Board of Accountancy.[5]

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the Board could rely on Rule 21A-20.012 pending the appeal, see Rule 9.310(b)(2), Fla.R.App.P., the Board's ruling in the instant cause is based solely upon the provisions of Chapter 473 and *other* applicable rules.

[5] It is specifically to be noted that other than by committing acts of fraud, see Section 473.323(1)(k), F.S., or lack of good moral character, see Section 473.323(1)(m), F.S., or similar violations CPAs can only be disciplined by the Board of Accountancy, if they are practicing public accountancy, and they are found guilty of the violations set forth in Section 473.323, F.S. In other words, with the above mentioned exceptions, CPAs who are not practicing public accountancy can not [sic] be disciplined by the Board of Accountancy for their transgressions.

The Hearing Officer, in coming to her conclusion that Respondent was not practicing public accountancy, and thus can not [sic] be guilty of false, fraudulent, deceptive or misleading advertising, depended largely upon a constitutional analysis, which, in the Board's opinion, is flawed. As is noted above, with the exception of the attest function (not at issue herein, since Respondent does not perform the attest function), Chapter 473 and [sic] is a Title, not a Practice act.

In *Abramson v. Gonzalez, supra,* at pp. 1575-1577, the Eleventh U.S. Circuit Court of Appeals analyzed at length the impact of Title Acts, as they relate to First Amendment guarantees of freedom of speech. While holding that unlicensed individ-uals [sic] cannot be prohibited from using generic terms, which described activities that they are permitted to perform under a Title Act, the Eleventh Circuit was firm in its opinion, that, if "unlicensed" individuals call themselves "licensed", they would be engaging in false, deceptive or misleading advertising and be subjected to penal provisions, including criminal and injunctive proceedings.

In the instant cause, Respondent is essentially engaged in the same type of activity which the Eleventh Circuit held could be banned by the State. In other words, Respondent advertises the fact that the [sic] she is a CPA, while performing the same "accounting" activities she performed when she worked for licensed CPA firms, but she does not concede that she is engaged in the practice of public accounting so as to bring herself within the jurisdiction of the Board of Accountancy for any negligence or errors she may be guilty when delivering her services to her clients.

Respondent is unwilling to acquiesce in the requirements of Chapter 473 and Chapter 21A, F.A.C., by complying with those requirements. She does not license her firm as a CPA firm; forego certain forms of remuneration denied to individuals who are practicing public accountancy; or limit the ownership of her firm to other CPAs. Respondent places the term "CPA" after her name on her business cards and letterhead, and in the yellow pages of the telephone directory all of which, by any standard, must be considered advertising.[6] Respondent further offers services to the public which, by her own admission, involve the use of the same accounting skills she used when she was performing accounting services in a CPA firm by so doing. Respondent has, in effect, told the public that she is subject to the provisions of Chapter 473, and the jurisdiction of the Board of Accountancy when she believes and acts as though she is not.[7] In light of the foregoing, Respondent is in violation of Rule 21A-24.001

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[6] See *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466, 108 S.Ct. 1916 100 L.Ed.2d 475 (1988), *Peel v. Attorney Registration and Disciplinary Com'n.*, ___ U.S. ___, 110 S.Ct. 2281, 2287 (1990), Rule 4-7.2 Rules of the Florida Bar.

[7] It is to be noted that Respondent could have simply been charged with practicing public accountancy through an unlicensed corporation in violation of Section 473.309, 473.3101 and 473.323(1)(a), F.S. Notwithstanding this fact, since the ultimate issue in this cause must be whether nor not Respondent is indeed practicing public accountancy by offering accounting services and using accounting skills while trading on the fact of her licensure as a CPA in without complying with the provisions of Section 473 and the rules promulgated thereto, and thus deceiving or misleading the public, it is appropriate to approach these alleged violations in the context of deceptive or misleading advertising.

and Section 473.323(1)(f), F.S. by engaging in deceptive, false and misleading advertising.

In order to analyze whether the Board's interpretation of its statute and rules is constitutional, one must turn to the Supreme Court's test for regulations on protected commercial free speech, set forth in *Central Hudson Gas & Electric, Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980), as follows:

> In commercial speech cases, then, a four part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted government interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

It is obvious that the use of a professional license appellation such as "CPA" is a form of commercial speech which, in the case of a CPA who holds an active individual license, is not illegal or inherently misleading. Thus, the statutes which limit the use of "CPA" licensure designation do impact First Amendment rights and satisfy the first prong of the *Central Hudson* test.

The second prong is satisfied, since it is obvious that the regulation of the practice of public accountancy is a valid governmental interest, indeed a vital one, see

United States v. Arthur Young & Co., 465 U.S. 805, 817-821, 104 S.Ct. 1495, 1503-1504, 79 L.Ed.2d 826 (1984), *Mercer v. Hemmings*, 170 So.2d 33 (Fla. 1964).

The rules and statutes in question satisfy the third prong of furthering the abovementioned governmental interest through making sure that only an individual who meets certain standards is permitted to call oneself a CPA. Included in those standards is the requirement that if an individual provides accounting services to the public while trading on the fact of his/her licensure, one must subject oneself to the statutes and rules governing the practice of public accountancy in the state. Needless to say, the use of the term "CPA" by an individual providing accounting skills and services to the public, while that individual at the same time asserts that one is not subject to the regulations of the statutory body created to regulate certified public accountants, would not further the purpose for CPA licensure set forth in Section 473.301, F.S.

Finally, the statutes and regulations in question, which simply require that individuals, who trade on the fact of their licensure as CPAs while offering accounting skills and services to the public, must comport with the rules and regulations governing the practice of public accounting, is a "reasonable fit" between the public good, i.e., and knowledge that any individual trading on the fact they are CPA, will be regulated by the public and agency in question, and the limitation on individual licensee's rights to call oneself a CPA while not complying with the requirements of the statute. *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028, 3034 106 L.Ed.2d 388 (1989). Since the

statutes and regulations only apply to those individuals who are engaged in offering accounting services to the public, as opposed to those who are in government or providing services only to their employer, it is appropriate that individuals should not be permitted to append the term "CPA" after their name, even though they hold an active license, if they are providing accounting services and skills to the public, but are not in compliance with all provisions of Chapter 473.[8]

The Hearing Officer's ruling that Respondent's advertising that she is a CPA in the telephone directory and in her business communications, can be remedied by verbal and visual disclaimers is in error. In essence, Respondent advertises the fact that she is a CPA to the general public, and performs identical or similar services

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[8] The Hearing Officer apparently placed great weight upon the fact that the CPA certificate states that the recipient "has passed all examinations and has met all other requirements prescribed by law and by rule of this board for certification as an expert public accountant, and is therefore entitled to append the letters CPA after this registrant's name to evidence registration by this board as a Certified Public Accountant." See Proposed Finding of Fact No. 4, and Proposed Conclusion of Law No. 15. The certificate is, of course, only evidence of a license. It is difficult to conceive, when construing the above mentioned terms on the CPA's certificate, that an individual is entitled to advertise the fact of licensure if that individual was not in compliance with all provisions of Chapter 473, and Chapter 21A, F.A.C. To do otherwise, would be to permit an individual to use the title "Certified Public Accountant" when advertising and providing accounting skills and services to the public, but not to be subject to those statutes and rules, which were specifically enacted to secure the integrity and objectivity of CPAs when providing such services.

to those which Respondent admits she performed in licensed CPA firms. Respondent and the Hearing Officer, however, apparently believe that since Respondent could verbally tell potential clients that she was not practicing public accounting, that the clients would have no reasonable expectation that Respondent would be subject to the rules and regulations of the Board of Accountancy. Potential clients, however, would clearly see Respondents [sic] use of the title "CPA" in her advertisements as an inducement to contact Respondent and seek her services thinking that she was a licensee subject to the rules of the Board of Accountancy. Since Respondent uses her accounting skills in then providing services to clients, it is illogical to believe that any disclaimer would disabuse a client of believing that Respondent's failure to meet adequate standards of professional competence would not result in disciplinary action by the very agency which granted her the license which she trades upon. It is axiomatic that the improper use of a Title when providing the services described by the Title by an individual either not licensed under the act, or unwilling to comply with various provisions of the statute and rules, when holding a license, is inherently misleading and may be prohibited. See *Accountant's Society of Virginia v. Bowman*, 860 F.2d 602, 605-606 (4th Cir. 1988). Since Chapter 473 and the rules promulgated thereto place reasonable conditions upon CPAs who wish to trade upon the fact of licensure in connection with using accounting skills and providing accounting services to the public, it is apparent that the Board's position that a CPA must comply with the statutes and rules when trading upon the fact of licensure as

a CPA, constitutes a "reasonable fit" for constitutional purposes.[9]

II

The Hearing Officer also found that the use of the term "CFP" (standing for Certified Financial Planner) by Respondent, in the telephone directory yellow pages, as

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[9] It is asserted by Respondent that since she is an attorney regulated by the Florida Bar, that the Board of Accountancy's assertion that she must comply with the provision of Chapter 473 and the rules promulgated thereto when she trades on the fact of her licensure as a CPA, and provides accounting services, constitutes the unlawful regulation of the practice of law. This position is erroneous. The mere fact that the Florida Bar permits attorneys to list other professional licenses as part of their credentials, see Rule 4-7.4, Rules of the Florida Bar, does not, and can not limit the responsibility of the dual license-holding attorney of complying with the requirements and rules of the other profession. It is obvious, for example, that any attorney who happens also to be a real estate broker, and who sells real estate in his law practice, can and will be subject to the Florida Real Estate Commission, for any violations of Chapter 475, and the rules promulgated thereto when he is selling real estate. This does not mean that the attorney will not also be subject to the rules of the Florida Bar, if, in the same real estate transaction, the attorney gave an erroneous title opinion. Dual license holding can and should subject the license holder to dual responsibility to the regulatory agencies having jurisdiction over the licensee. It is up to the licensee to resolve conflicts between the rules and statutes of the regulatory bodies, either by modifying the licensee's practice, so as to comport appropriately with all regulatory bodies, whose profession is being practiced by the licensee, or to cease leading the public to believe that the licensee complies with all regulatory requirements by trading on a license, when the license will not adhere to the strictures of that profession.

well as on her business card and letterhead, was not a violation of Rule 21A-24.001, F.A.C., and Section 473.323(1)(f), F.S.

Rule 21A-24.001(1)(g)-(j) and (2) states as follows:

> (1) No licensee shall disseminate or cause the dissemination of any advertisement or advertising which is in any way fraudulent, false, deceptive, or misleading, if it, among other things:
> (g) States or implies that the licensee has received formal recognition as a specialist in any aspect of the practice or public accountancy unless he has in fact received such recognition and such recognizing agency is approved by the Board. In the event a licensee uses the term "specialty" or "specialist" or any other term tending to indicate that he specializes in any aspect of the practice of public accountancy the advertisement must state that the use of the term is self-designation and is not sanctioned by the state or federal government in any advertisement or offering to the public unless such terms and recognition have been approved by the Board. However, a licensee may indicate the services offered and may state that practice is limited to one or more types of services when this is in fact the case; or
>
> (h) Represents that professional services can or will be competently performed for a stated fee when this is not the case, or makes representations with respect to fees for professional services that do not disclose all variables affecting the fees that will in fact be charged; or

(i) States a form of recognition by any entity other than the Board that uses the terms "certified," "public," or "auditor," or "auditing" however, this would not prohibit a licensee from disclosing that he is a CPA in another state or jurisdiction; or

(j) States or implies that the licensee has received formal recognition as a specialist in any aspect of the practice of public accounting, unless the statement contains a disclaimer stating that the recognizing agency is not affiliated with or sanctioned by the state or federal government. The advertisement must also contain the agency's requirements for recognition, including, but not limited to, educational, experience and testing. These statements must be in the immediate proximity of the statement that implies formal recognition as a specialist.

(2) As used in the rules of the Board, the terms "advertisement" and "advertising" shall mean any statements, oral or written, disseminated to or before the public or any portion thereof, with the intent of furthering the purpose, either directly or directly, [sic] of selling public accounting services, or offering to perform public accounting services, or inducing members of the public to enter into any obligation relating to such public accounting services. For purposes of this rule, oral or written statements include business cards and letterhead.

Insofar as the Board has found above that Respondent is practicing public accounting, it is obvious, as a matter of law, that her advertisements in the yellow pages, business cards and letterhead of the fact that she is

a Certified Financial Planner through the use of the initials "CFP", are violations of Rule 21A-24.001 as set forth above, and therefore, Section 473.323(1)(f), F.S.

Paragraph 25 of the Hearing Officer's Conclusions of Law, wherein she tasks the Board of Accountancy for not "proving up any rationale" for it's [sic] *rule* relating to the use of the term "certified" is outside the purview of the instant Section 120.57(1) proceeding. A Hearing Officer of the Division of Administrative Hearings, when faced with a promulgated rule, must apply that rule to the facts set before her. It is not necessary for the agency to prove up the rationale for the rule in every Section 120.57(1), F.S. hearing relating to the application of that rule before the Division of Administrative Hearings.

Notwithstanding the foregoing, the rationale for the Board's prohibition of the publication of credentials using terms such as "certified" by CPAs practicing public accounting when those designations have not been approved by the Board of Accountancy as specialties in the practice of public lexicon, "certified", when used in conjunction with public accountancy, means state licensure or approval. See *Peel v. Attorney Registration and Disciplinary Commission*, ___ U.S. ___, 110 S.Ct. 2294-95, (1990), (Marshall, J. concurring). It is the Board's position that the use, by a CPA, of any of the terms set forth in Rule 21A-24.001(1)(i), when those terms have not been approved by the Board is inherently misleading.

In balancing the public's right to know of attainments of CPAs in addition to their license as a CPA, it is the Board's position that the use of terms set forth in Rule 21A-24.001(1)(i), in conjunction with the term "CPA" and

the practice of public accounting, are so close to the terms protected by state licensure itself, that their use, when not approved by the Board, inherently mislead the public into believing that state approval and recognition exists. The terms prohibited by Rule 21A-24.001(1)(i), thus can only be used in conjunction with the term "CPA" when the Board has, in fact, approved a form of recognition or self designation using such terms as a Board approved speciality. It is to be noted that the Board has the authority to approve the use of such speciality designation by CPAs, however, no request has ever been made for approval either by Respondent or by the parent organization which awarded her the certificate as a Certified Financial Planner, cf. *Accountant's Society of Virginia v. Bowman, supra.*

As such therefore, it is apparent that Respondent has advertised the fact that she is a CFP or Certified Financial Planner, which, in the context of an individual practicing public accounting and trading on the fact that she is a certified public accountant, has been determined by the Board to be false, deceptive and misleading advertising by implying a speciality of public accountancy, not recognized by the Board of Accountancy.

CONCLUSION

Based upon the foregoing, Respondent is hereby found to be in violation of Section 473.323(1)(a), (f), (g), (h) and Rule 21A-24.001, F.A.C., and is hereby disciplined as follows:

Respondent is hereby REPRIMANDED with the imposition of the reprimand being stayed until any appellate proceedings in this cause are completed.

DONE and ORDERED this 23rd day of April, 1992, by the Florida Board of Accountancy.

/s/ Beryl H. Davis,
BERYL H. DAVIS,
CHAIRMAN

CC: Counsel of Record

wp/Ibanez(S)

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

STATE OF FLORIDA, DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF ACCOUNTANCY, Petitioner, vs. SILVIA IBANEZ, Respondent.	)	CASE NO. 91-4100

RECOMMENDED ORDER

Upon due notice, this cause came on for formal hearing on August 27, 1991, in Tallahassee, Florida, before Ella Jane P. Davis, a duly assigned Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

FOR RESPONDENT:
Tobi C. Pam, Esquire
Department of Professional Regulation
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1940 North Monroe Street
Tallahassee, FL 32399-0792

FOR RESPONDENT SILVIA S. IBANEZ:
Silvia S. Ibanez, Esquire
Post Office Drawer 7667
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and
Michael P. Sampson, Esquire
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STATEMENT OF THE ISSUES

(1) Count I of the Amended Administrative Complaint as modified by the August 22, 1991 Order on Reconsideration alleges Respondent Certified Public Accountant (CPA) practiced public accounting in an unlicensed firm by appending the CPA designation after her name in the telephone book and on business cards in violation of Sections 473.323(1)(a), (g), and (h) *F.S.* and Rule 21A-20.012 *F.A.C.*

(2) Count II of the Amended Administrative Complaint as modified by the August 22, 1991 Order on Reconsideration alleges that Respondent CPA violated Sections 473.323(1), (g), and (h) and Rule 21A-24.001(1)(g) *F.A.C.* by appending the certified financial planner (CFP) designation along with the CPA designation after her name in the telephone book and on business cards, in that the CFP designation allegedly is an unapproved specialty of accountancy.

(3) Count III of the Amended Administrative Complaint as modified by the August 22, 1991 Order on Reconsideration alleges that Respondent CPA practiced public accounting by holding herself out as a CPA by appending the CPA designation after her name in the telephone book and on her business cards, implying that she abides by the provisions of Chapter 473 *F.S*, and is thereby in violation of Sections 473.323(1)(f), (g), and (h) *F.S.* and Rule 21A-24.001 *F.A.C.* [no specific subsections cited].

PRELIMINARY STATEMENT

Silvia S. Ibanez (Ibanez) filed a petition on May 10, 1991 challenging the validity of Rule 21A-20.012 *F.A.C.*, one of the rules upon which this instant disciplinary action by the Department of Professional Regulation (DPR) against Respondent Ibanez is based. That case was styled *Ibanez et al. v. Board of Accountancy et al.*, DOAH Case No. 91-3336R. On June 13, 1991, DPR filed this instant disciplinary action against Ibanez. The initial administrative complaint was triggered by anonymous notification to DPR of the contents of Ibanez' telephone listings and business card. The two cases were consolidated.

DPR filed an amended administrative complaint on July 30, 1991, which amendments were opposed by motion. In consideration of those motions, the amended administrative complaint was modified by the Order of Reconsideration entered August 22, 1991.

After bifurcation and formal hearing in the rule challenge, the instant disciplinary case was heard in formal hearing on August 27, 1991.

DPR had three exhibits admitted in evidence and presented the oral testimony of Louis Dooner, Elise Rice, and Martha Willis.

Ibanez had admitted twelve exhibits and presented the oral testimony of Robert Goss. Respondent Ibanez also testified on her own behalf.

A transcript was provided.

The parties also stipulated that the testimony and exhibits from the rule challenge, *Ibanez et al. v. Board of*

Accountancy et al., DOAH Case No. 91-3336R, would be copied, certified, and adopted into the record of the instant case. That has been accomplished.

All timely filed proposed findings of fact have been considered and ruled on in the appendix to this recommended order, pursuant to Section 120.59(2) *F.S.*

This recommended order relates solely to the instant disciplinary action.

FINDINGS OF FACT

1. Respondent Silvia S. Ibanez is a practicing attorney, a member of the Florida Bar, and holds active Florida CPA License No. 10842, currently in good standing. She is also a Registered Investment Advisor with the Florida Division of Securities and a certified financial planner (CFP). At all times material, she has been actively certified as a CFP in good standing with the International Board of Standards and Practice for Certified Financial Planners (IBCFP).

2. The IBCFP is a corporation. "CFP" and "certified financial planner" are registered trademarks. The IBCFP has no governmental affiliations within the state of Florida. The Florida Board of Accountancy has no involvement in the CFP accrediting process and no proprietary interest over the CFP mark.

3. As a licensee with the federal Securities and Exchange Commission, Ibanez is required to, and does, disclose the fact that she is a CPA.

4. Ibanez' CPA certificate (like all Florida CPA certificates) authorizes her to display her CPA credentials. The CPA certificate represents that the recipient,

> . . . has passed all examinations and has met all other requirements prescribed by law and by rule of this board for certification as an expert public accountant, and *is therefore entitled to append the letters CPA after this registrant's name to evidence registration by this board as a Certified Public Accountant.* [*Emphasis supplied*]

5. The Board of Accountancy's only classifications of CPA licenses/licensees are "active" or "inactive." "Active" and "inactive" refer to the status of the CPA license and do not refer to or imply that the licensee is actively practicing public accounting. One can be an actively licensed CPA and not be practicing public accounting.

6. The Board of Accountancy issued a letter opinion to Ibanez that a CPA who offers financial planning services for a fee but who does not hold out as a CPA or become associated with financial statements would not be practicing public accounting.

7. Ibanez is listed in the yellow pages under the heading, "Attorneys," as "Ibanez, Silvia, S., CPA, CFP." Respondent also is listed in the white pages as "Ibanez, Silvia S., CPA CFP atty." On their face, there is nothing false or fraudulent about these listings. As an attorney, Petitioner also places "CPA" after her name on her business cards and on her letterhead. The Respondent's business card states "Sylvia [sic] Safille Ibanez, JD, CPA, CFP." DPR contends that *because* Petitioner "holds out" to the public as a CPA, uses accounting skills, and provides

one or more types of management, advisory or consulting services, she is currently "practicing public accounting."

8. Ibanez is not listed in the yellow pages under "accountants," "accountants, certified," or "CPAs."

9. Neither the CFP nor CPA credential is part of the firm name, "Silvia S. Ibanez, P.A. – Law Offices," which also appears on Ibanez' business card. Ibanez' telephone directory listings and card at issue show the CPA and CFP credentials strictly appended to Respondent's individual name.

10. Louis Dooner, accepted as an expert certified public accountant, testified that the Respondent is involved in the practice of public accounting because by merely appending the CPA designation after her name on her business cards, she is telling the public that she is offering to perform services that CPAs perform.

11. Respondent Ibanez currently operates as a sole practitioner of law employed by the law firm of "Silvia S. Ibanez, P.A." As such, she provides specialized legal services for her clients not provided by CPAs. As part of her current, normal professional activities as an attorney, she provides all types of tax services to her clients, including tax opinion work, representation before the Internal Revenue Service, and evaluation of the tax consequences of certain transactions. She also performs financial counselling and planning for her clients. In doing so, she utilizes both her legal education, training, and experience and her education, training, and experience as a CPA. Prior to admission to the Florida Bar, Ibanez was employed by two CPA firms where she did substantially similar work, plus audits.

12. It is conceded by the parties that it is possible to practice law and public accounting in the same business activity and that many activities conducted by professionals and nonprofessionals other than by CPAs and other than by attorneys are identical to activities performed by CPAs engaged in public accounting. For instance, anyone can legally prepare a tax return. Bookkeepers and free-lance tax assistors of all sorts are unregulated in any way.

13. Truthful use, communication, or disclosure of the CPA credential by an actively licensed CPA does not *per se* constitute false, misleading, or deceptive advertising. The evidence does not support a finding that withholding truthful disclosure that one has earned the CPA credential benefits the public welfare or effects the purposes of the enabling legislation, or indeed, how such nondisclosure could promote them, particularly since it has been shown that persons of considerably lesser competency and achievement levels in the discipline of accounting may legally offer to the public almost all the services provided by CPAs.

14. The use of the term "CPA" implies a specific competency to the public. The fact that Ibanez is a CPA is valuable to her legal clients. CPA status is a valuable property right to each CPA, and the ability of a practicing attorney to publicize the fact that s/he holds an active CPA license is a valuable asset to that individual.

15. The only activity among public accounting activities that is a unique activity of CPAs is the "attest" function. See, Section 473.322(1)(c) *F.S.* There is no evidence that Respondent Ibanez attests as a CPA in the

course of her law practice or that she personally performs audits.

16. Ibanez testified credibly that her intent in appending the CPA and CFP credentials solely to her own name is to indicate that she is, in her own right, individually licensed as a CPA and CFP.

17. Respondent Ibanez has clearly marked her office premises with all the indicia of a law office, including two signs posted outside the building itself. One sign specifies that the building constitutes "law offices," that "Silvia S. Ibanez, P.A." is located there, and that Ibanez is an "attorney at law," with no reference to her CPA or CFP credentials. Another sign specifies, "law offices," without any reference to her CPA or CFP credentials. A potential client must pass these two signs just to enter the building that houses Ibanez' law office. Once in the building, a potential client also must be admitted by a secretary to Ibanez' inner office.

18. Ibanez has consistently required her secretary to screen all telephone calls and potential clients who enter the office to be certain that persons seeking out Ibanez will be fully informed that Ibanez is not offering strictly accounting services and that she is practicing law. Ibanez also personally makes that information clear to individuals at each initial office consultation and consistently follows up office consultations at which her legal employment has been negotiated with letters and/or employment contracts which set forth the parameters of the legal services she has agreed to perform for clients.

19. Elise Rice is an employee of Petitioner Department of Professional Regulation who has earned a vocational school accounting diploma. She is not a CPA, nor is she an attorney. Ms. Rice testified that she, personally, drew the conclusion from looking at Respondent's business card that the Respondent was a CPA, but that she did not know what CFP or JD signified and therefore she would not assume from the card that Ibanez was a lawyer or a certified financial planner. Clearly, the designation "CFP" did not suggest to Ms. Rice that Ibanez was advertising either a specialty or particular competence in public accounting.

20. Ms. Rice further stated that, despite Ibanez' business card's clear use of the term "law offices," she would continue to believe that Ibanez was doing both CPA work and legal work of "law offices." Ms. Rice further stated that even if she telephoned ahead and spoke to a secretary who clearly indicated that Ibanez was a CPA but was working as a lawyer, she would persist in believing that Ibanez was doing both CPA work and legal work out of "law offices." Ms. Rice also testified that if she arrived at Ibanez' office building and was confronted by the sign posted there which clearly indicates Ibanez is an attorney at law and the two signs that clearly state that the building houses only "law offices," she would then believe that she had come to the wrong place to find Ibanez the CPA. However, Ms. Rice conceded that, under the latter circumstances, the premises were, indeed, law offices. Ms. Rice's personal view that Ibanez must be acting as a CPA in the face of significant information to the contrary is not persuasive that the average layman would be misled by Ibanez' business

card and telephone listings in the face of all her other disclosures.

21. One who has initially consulted the yellow pages of the telephone directory under the heading "attorneys" would most logically infer from Ibanez' yellow pages listing that Ibanez is a practicing attorney who is dually licensed as a CPA and who possesses a CPA's education, training, experience, and skills and that Ibanez is offering to act as a lawyer capable of applying her additional education, training, experience, and skills as a CPA and CFP.

22. The inferences that the average viewer might draw from Ibanez' white pages telephone listing and her business card are more blurred, but Ibanez demonstrated, and it is conceded by both parties, that an individual may have the opportunity to disabuse members of the public that s/he is engaged in the activity of the practice of public accounting or that s/he is offering all the services normally associated with a CPA, as opposed to law or some other profession, at least where there is direct contact by letter or telephone.

23. It may be reasonable that at least until making direct contact with Ibanez or her office staff, the average viewer of either the telephone listings or the card would assume that, as a CPA, Ibanez is subject to disciplinary oversight by the licensing authority for accounting functions only and that she abides by all Board of Accountancy regulations while doing accounting. However, prior to any meaningful employment, Ibanez exercises reasonable care to disabuse the average viewer of that belief.

24. Since 1982, the Board has consistently issued letter opinions on an individual basis to the effect that the designation "certified financial planner" is an accountancy specialization which has not been approved by the Board and further holding that "CFP" could not be displayed by CPA licensees on stationery or in yellow pages listings in conjunction with the CPA designation. The Executive Director of the Florida Board of Accountancy did not know how "certified financial planner" came to be viewed as a specialty designation of certified public accounting, and the letter opinions do not set forth the Board's rationale for considering it as a specialty. The Board has adopted no rule to that effect. Further, in this proceeding, the agency has not proven any rationale for the policy set forth in the Board opinions.

25. The agency presented no evidence by way of anecdotal experience, professional studies, or accumulated data to show that licensed CPAs or certified CFPs have ever mislead [sic] members of the public purely by displaying their credentials in the manner Ibanez has done here.

26. DPR knows of no complaint and has never received any complaint from a member of the public regarding Ibanez' professional activities or advertising. Nor is there any evidence that any member of the public has ever been confused about whether or not Ibanez was practicing accounting or law or financial planning or that any member of the public was mislead into hiring Ibanez under the impression that she would be acting as a CPA solely and not as an attorney, or that she would be performing audits or performing the attesting function of a CPA.

27. Upon the scenario established in the case *sub judice*, Ibanez is not guilty of any fraudulent advertising so as to mislead the public to the effect that she abides by all regulations of the Board of Accountancy.

CONCLUSION OF LAW

1. The Division of Administrative Hearings has jurisdiction of the parties and subject matter of this cause. See, Section 120.57(1) *F.S.*

2. Respondent is charged in the three-count amended administrative complaint with several violations of Sections 473.323(1)(a), (f), (g), and (h) and of Rules 21A-20.012 and 21A-24.001 *F.A.C.* solely because she is alleged to be "practicing public accounting or accountancy." The counts overlap in some respects as discussed *infra*.

3. Section 473.302(4) *F.S.* provides, in pertinent part:

> (4) "Practice of," "practicing public accountancy," or "public accounting accounting" means:
>
> (a) Offering to perform or performing for the public one or more types of services involving the use of accounting skills, or one or more types of management advisory consulting services, by a certified public accountant, or firm of certified public accountants, of this state, including the performance of such services in the employ of another person; or
>
> (b) Offering to perform or performing for the public one or more types of services involving the use of accounting skills or one or more types of management advisory or consulting

services, by any other person holding himself or itself out as a certified public accountant or firm of certified public accountants, including the performance of such services by a certified public accountant in the employ of a person so holding himself or itself out.

However, these terms shall not include services provided by the American Institute of Certified Public Accountants or the Florida Institute of Certified Public Accountants, or any full service association of certified public accounting firms whose plans of administration have been approved by the board, to their members or services performed by these entities in reviewing the services provided to the public by members of these entities.

4. Section 473.323(1) *F.S.* provides, in pertinent part:

473.323 Disciplinary proceedings.

(1) The following acts constitute grounds for which the disciplinary actions in subsection (3) may be taken:

(a) Violation of any provisions of s. 473.317, s. 455.227(1), or any other provisions of this act;

* * *

(f) Advertising goods or services in a manner which is fraudulent, false, deceptive, or misleading in form or content;

(g) Upon proof that the licensee is guilty of fraud or deceit, or of negligence, incompetency, or misconduct, in the practice of public accounting;

(h) Violation of any rule adopted pursuant to this act or chapter 455;

* * *

5. Rule 21A-20.011 *F.A.C.* defines "practice of," or "practicing public accountancy" as follows:

21A-20.011 Practice of, or Practicing Public Accountancy

"Practice of, or practicing public accountancy" as defined by Section 473.302(4), F.S., shall exclude any of the following:

(1) Services rendered by a licensee as an employee of a governmental unit or an employee rendering accounting services only to his employer as long as that employer is not required to be licensed under F.S. 473, or

(2) Activities of licensees who do not hold themselves out as CPAs and who are not associated with financial statements, or

(3) Activities of licensees who do not hold themselves out as certified public accountants.

6. Rule 21A-20.012 *F.A.C.* attempted to define "holding out," as follows:

21A-20.012 Holding Out

"Holding himself or itself out" as used in F.S. 473.302(4) is defined as publicizing that the licensee is a certified public accountant when providing, or offering to provide services or products to the public, in such manner that an uninformed person may not be able to differentiate whether or not the licensee may also be in the practice of public accounting. The display of the CPA certificate and license issued by the

> Department of Professional Regulation shall not constitute holding out under the terms of this rule. All other publication of the fact that a licensee is a CPA constitutes holding oneself out.

However, Rule 21A-20.012 *F.A.C.* has been ruled invalid in a Final order entered simultaneously herewith in *Ibanez et al. v. DPR, Board of Accountancy,* DOAH Case No. 91-3336R.

7. Rule 21A-24.001 *F.A.C.* is a rule of many subparts defining and precluding certain forms of advertising by CPAs.

8. In their prehearing stipulation, the parties stipulated, as fact, that the Board of Accountancy will not deem Ibanez' activities, including those of an accounting nature, to be public accounting activities if any of the three exclusions under Rule 21A-20.011 *F.A.C.* apply. This stipulation is more in the nature of a stipulation of law than one of fact and has been treated as such. The parties also stipulated as matters of law that the exclusion in Section (3) of Rule 21A-20.011 *F.A.C.* is wholly dependent on the definition of "holding out" and that the credential "CFP" is not a "self-designation" as used in Rule 21A-24.001(1)(g) *F.A.C.*

9. DPR asserted that Ibanez is engaged in "practicing public accounting" as set forth in one or both of the definitions of that term contained in subparagraphs (a) and (b) of Section 473.302(4) *F.S.* Ibanez countered to the effect that she was exempt from those statutory definitions on the basis of one or more of three exclusions to

the term "public accounting," which are set forth in Sections (1), (2), and (3) of Rule 21A-20.011 *F.A.C.*, and therefore, she could not be held to have violated any portion of Chapter 473 *F.S.* More specifically, Ibanez urged that because she is working as an attorney within a P.A. (which she asserted is an employer not required to be licensed under Chapter 473 *F.S.*), she falls under exception 21A-20.011(1) *F.A.C.*

10. First, Rule 21A-20.011 *F.A.C.* cannot be fairly interpreted or legally construed as a blanket exemption from the applicability of *all* Chapter 473 *F.S.* provisions. Minimally, Ibanez remains subject to the Chapter's payment of fees, continuing education, and good moral character requirements. Secondly, Ibanez' argument with regard to Section (1) of that rule is not persuasive, since she renders personalized services in her own right directly to the public, regardless of certain liability and tax protections afforded her personally by the "P.A." status of her law firm.

11. Whether or not Ibanez comes within the remaining exceptions set forth in Sections 21A-20.011 (2) and (3) *F.A.C.* depends upon how the term "holding out" as used therein is interpreted. The definition of "holding out" is not wholly tied to the invalidated rule, 21A-20.012 *F.A.C.* Absent that rule, interpretation of the statutory term "holding out" is appropriate. Normally, the clear common meaning of the statutory term would be applied. Unfortunately, in this proceeding, statutory interpretation is still rendered "circular" due to Rule 21A-20.011(2) and (3) *F.A.C.*

12. The definition of "practicing public accounting" contained in Section 473.302(4)(a) *F.S.* encompasses Ibanez, who is a CPA licensee. That definition covers "offering to perform or performing for the public one or more types of services involving the use of accounting skills, or one or more types of management advisory consulting services, *by a certified public accountant, . . .* " regardless of whether or not the CPA "holds out." [Emphasis supplied] However, Sections (2) and (3) of Rule 21A-20.011 *F.A.C.* address Section (a) as well as (b) of 473.302(4) *F.S.* The rule provides that, " *'Practice of, practicing public accountancy' as defined by Section 473.302(4) F.S. shall exclude* any of the following . . . (2) activities of licensees who do not hold themselves out as CPAs and who are not associated with financial statements, or (3) activities of licensees who do not hold themselves out as certified public accountants." [Emphasis supplied] It is fairly debatable whether Rule 21A-20.011(2) and (3) *F.A.C.* legitimately interpret the legislative intent of Section 473.302 (4)(a).[1] It is also fairly debatable whether or not Rule 21A-20.011 *F.A.C.* exceeds the Board's statutory mandate and insinuates the Board's discipline into other professions. However, no petition to determine the validity of Rule 21A-20.011 *F.A.C.* has been filed. Therefore, Rule 21A-20.011 *F.A.C.* continues to be entitled to the great weight normally afforded existing agency rules.

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[1] It seems abundantly clear that absent the exceptions of Rule 21A-20.011 *F.A.C.*, Section 473.302(4)(a) *F.S.* would render actively licensed CPA Ibanez subject to Board discipline whether she "holds out" or not, and it is only section 473.302(4)(b) which includes the term "holding out."

13. Great weight must be afforded to the agency's interpretation of the statutes it administers. It is recognized that DPR and the Board have consistently declined to prosecute any CPA offering all the services Ibanez does unless that CPA was also "holding out" in some manner. It is further recognized that in the instant case, DPR has stipulated that if any of the three exemptions in Rule 21A-20.011 *F.A.C.* applies, then Ibanez' activities, including those of an accounting nature, do not constitute public accounting activities. Applying the three foregoing principles, it ultimately must be concluded that Ibanez' activities, even though she is a licensed CPA, do not constitute "practicing public accounting" *unless* she is one of those "holding themselves out as certified public accountants."

14. Ibanez interprets financial statements, but she is not "associated" with them in the sense that term is normally applied to CPAs. She is not attesting or performing audits. She is not performing any activity that *requires* licensure by the Board of Accountancy. The Board admittedly could not discipline a non-CPA for performing the accounting activities Ibanez is performing.[2] Some of the activities Ibanez performs are the same as activities performed by CPAs. Many are not. As an attorney, she also performs specialized services for her clients that are

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[2] Section 473.322(1)(c) *F.S*, which reserves the "attest" function strictly to CPAs, also specifies that, "This subsection shall not prevent the performance by persons other than certified public accountants of other services involving the use of accounting skills, including the preparation of tax returns and the preparation of financial statements without expression of opinion thereon.

not performed by other CPAs. Her telephone listings and business card do not "hold out" that she will perform any activity exclusive to public accounting or that she will perform work *as* a CPA. All indicia of her office premises, all of her disclaimers, and the majority of actual activities she performs support a conclusion that she is not "holding herself out as a certified public accountant." It is therefore concluded that she is not "holding herself out as a certified public accountant" practicing public accountancy so as to be subject to discipline for the violations charged in the instant amended administrative complaint. Nor is she guilty of any fraudulent advertising so as to mislead the public to the effect that she abides by all the regulations of the Board of Accountancy. Moreover, if the purpose of the police power here exercised is to protect the public, it is difficult to see how the public is harmed by Ibanez' advertising or services, which services she provides only after reasonable – indeed elaborate – efforts at avoiding any misapprehension of her CPA status by those employing her.

15. In making the determination that Ibanez is not "holding herself out as a CPA," the undersigned has weighed both the permissions granted to the Respondent by the Board of Accountancy in its certificate of licensure and the permissions granted to the Respondent by the Legislature under Section 473.322 *F.S.*[3] The undersigned

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[3] Section 473.322 *F.S.* permits a CPA to assume and use his or her validly earned credential and title and to put it in words, letters, abbreviations, signs, cards and devices so long as s/he is actively licensed. The credential provides much the same. See, Finding of Fact 4, *supra*.

also has considered the thrust of the opinions in *Cenac v. Florida State Board of Accountancy*, 399 So. 2d 1013 (Fla. 1st DCA 1981) and *Florida Accountants Assoc. v. Dandelake*, 98 So. 2d 323 (Fla. 1957). *Dandelake* considered the occupational rights of accountants who are not certified *viz a viz* the Board's regulatory powers. *Cenac* considered the situation of an inactively licensed CPA performing many but not all the services normally considered "practicing public accountancy."

16. Although this is a case of first impression with regard to an actively licensed CPA and those cases were decided with regard to different predecessor statutes and absent any similar rule in place, they provide direction. Those cases are persuasive (1) that a balanced weighing of all indicia of the "practice of public accounting" is to be done when determining whether or not a practitioner is "holding out as a CPA," (2) that a single indicator of whether or not a practitioner is "holding out" should not outweigh any other indicator, and (3) that the degree of benefit derived by the CPA from use of his or her CPA status must also be balanced against any real or potential harm therefrom to the public.

17. On their face, Ibanez' business card and yellow pages listing may reasonably be considered "advertising." "Advertising" is commonly thought of as constituting "holding out" a person, a product, or a service, but in this case, Ibanez' business card and yellow pages listing go no further than conveying to the public passive, but valuable, biographical information which every actively licensed CPA is entitled to assume, use, and append to his name in a variety of ways. The record is utterly

devoid of any evidence that Ibanez has mislead the public into believing she would perform all the functions of a CPA. The fact that her listing in the yellow pages is under the heading "attorneys" and is not associated with accountancy headings is especially significant in this regard, as is the care with which she has labelled her law office and instructed her staff. No dishonesty or misleading activity has been shown in this case, except to the extent that advertisement of her CPA status initially inaccurately suggests that she is subject to broad disciplinary oversight by the licensing agency. Her subsequent disclaimers as to what she will or will not undertake professionally would seem to "cure" any potential for the public to be mislead by her advertising.

18. In analyzing all indicia of "holding out," disclaimers may be considered. In the recommended order underlying the *Cenac* case, Hearing Officer Ayers considered as significant all disclaimers by the practitioner to his clients that the practitioner was not practicing public accounting or was not offering all of the services normally associated with CPA status. The reviewing court did not disturb the hearing officer's assessment that such disclaimers are significant to determine the issue of "holding out" and the issue of whether there had been actual or potential fraud upon the public.[4]

---

[4] The opportunity and effectiveness for use of disclaimers by professionals so as to not mislead the public has most recently been explored in *Peel v. Attorney Registration and Disciplinary Comm'n*, ___ US ___, 110 S. Ct. 2281, 110 L.Ed. 2d 83 (1990). See, also "Post-Peel Battles", *The National Law Journal*, Vol. 14 No. 17-18 (December 30, 1991 – January 6, 1992).

19. Although DPR urges a more literal and far more restrictive reading of the term "hold themselves out as public accountants," such a highly restrictive interpretation is not appropriate when dealing with commercial free speech. Commercial free speech constitutes expression related exclusively to the economic interests of the speaker and the audience. DPR's concept that merely appending the designation "CPA" after Ibanez' name misleads the public and must be prevented would constitute a speaker specific, unqualified ban on a category of expressive activity without any appropriate limitation based on time, place, or manner. Since this record is devoid of proof that anyone has been mislead by Ibanez, and it is clear her disclosure is valuable to her audience, great care must be taken before applying a highly restrictive interpretation of the statute. Contrary to DPR's urging, where a less restrictive interpretation is available, one should not assume that *any* benefit to the CPA, no matter how small that benefit may be, will be sufficient to concomitantly subject the CPA to discipline absent some demonstrated harm to the public. Consequently, where, as here, no evil to be prevented by the police power has been clearly demonstrated, the balance weighs against finding Ibanez to be "holding out."

20. The concept of balancing the benefit derived by the speaker (a CPA in this case) against the evil sought to be defended against by the police power of the state was only peripherally discussed in *Cenac*, but that balancing test for interpreting statutes has since been echoed and refined in other cases involving commercial free speech. See, *Central Hudson Gas v. Public Service Commission*, 447 US 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980) and *Florida*

Bar v. Brumbaugh, 355 So. 2d 1186 (Fla. 1978). The potential for harm to the public must be recognizable and must clearly outweigh any anticompetitive impact, and other, less restrictive means of regulating the licensee must not be available. Blanket prohibitions on commercial speech are disfavored in the law. Any restriction on commercial speech requires the government goal to be substantial and the cost to be carefully calculated. There must be a "reasonable fit" between the statute's ends and the means chosen to accomplish those ends. Government may ban commercial speech that is more likely to deceive the public than to inform it or commercial speech that is related to illegal activity. However, in most other contexts, the First Amendment prohibits regulation based on the content of the speech, provided the content is basically truthful. Where the information is presented in a way that is not deceptive it should be permitted even though potentially misleading. See, *Fane v. Edenfield*, Case No. 90-3943 U.S. Ct of Appeals, 11th Circuit, 945 F. 2d 1514 (October 30, 1991), specifically ruling that Chapter 473 *F.S.* "must be narrowly tailored to achieve its anticipated objectives." See also, *Bd. of Trustees of State University of New York v. Fox*, 492 US 469, 109 S.Ct. 3028, 106 L. Ed. 2d 388 (1989); *Shapero v. Kentucky Bar Ass'n*, 486 US 466, 108 S. Ct. 1916, 100 L. Ed. 2d 475; *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 US 328, 106 S. Ct. 2968, 92 L. Ed. 2d 266 (1986); *In re R.M.J.*, 455 US 191, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982); and *Consolidated Edison Co. of N.Y., Inc. v. Public Service Cmm'n*, 447 So. 2d 530, 100 S.Ct. 2326, 65 L. Ed. 2d 319 (1980). If this statutory and regulatory scheme were interpreted as DPR requests, it could be determined to be unconstitutional.

Courts have a duty, if reasonably possible and consistent with constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutionality and to construe it so as not to conflict with constitutional provisions. See, *Industrial Fire & Casualty Ins. Co. v. Kwechin*, 447 So. 2d 1337 (Fla. 1983); *State v. Gale Distributors, Inc.*, 349 So. 2d 150 (Fla. 1977); *Marsh v. Garwood*, 65 So. 2d 15 (Fla. 1953). Accordingly, a construction of the statutory term "holding out" in consonance with the rationale in *Cenac* and *Dandelake* that the public is only harmed if substantially misled avoids any potential constitutional conflict in interpreting the provisions of Chapter 473 *F.S.* What is important in Ibanez' case is that, although she is an actively licensed CPA, she has induced no unwarned reliance on her CPA certification. She has made full disclosure with disclaimers appropriate to the situation.

21. The foregoing conclusion that Respondent Ibanez is not "holding herself out as a CPA" so as to be subject to license revocation, suspension, or other discipline by the Board resolves in her favor all issues raised in all three counts of the Amended Administrative Complaint. However, that pleading is somewhat less than clear, so some further commentary as to the specific charges may be in order.

22. Count I of the Amended Administrative Complaint originally contained allegations under Sections 473.309 and 473.3101 *F.S.* that Ibanez' law firm should have been licensed and was unlicensed as a certified public accounting firm. That allegation was withdrawn by Petitioner as reflected in the August 22, 1991 Order on Reconsideration. Consequently, Count I of the Amended Administrative Complaint herein only charged Ibanez

pursuant to Sections 473.323(1)(a) *F.S.* [violation of Sections 473.317 and 455.227(1) or any other provisions of Chapter 473 *F.S.*], Sections 473.323(1)(g) *F.S.* [fraud or deceit, or of negligence, incompetency or misconduct *in the practice of public accounting*] and 473.323(1)(h) *F.S.* [violation of any rule adopted pursuant to chapters 473 or 455], and Rule 21A-20.012 *F.A.C.*, now determined to be invalid. [Emphasis supplied]

23. Section 473.317 *F.S.* involves competitive negotiation wherein the licensee will attest as an expert in accountancy. Section 455.227(1) *F.S.*, is a professional disciplinary "catchall." The Amended Administrative Complaint herein alleges no specific acts constituting competitive negotiation and no factual evidence to that effect was introduced at formal hearing. The evidence is clear that Ibanez does not perform the "attest" function unique to CPAs which is an integral part of Section 473.317 *F.S.* DPR's proposed recommended order does not even argue those issues. Due to DPR's withdrawal of the charges in Count I specifically citing Sections 473.309 and 473.3101 *F.S.*, as recognized in the Order on Reconsideration, it must be concluded that Ibanez could not be held in this proceeding to have violated those statutory provisions which were withdrawn. Therefore, even *if* Ibanez were practicing public accounting and was therefore subject to the Board, those charges alleged under Count I were not established in this case.

24. Under Count II, Ibanez was also charged with violating Sections 473.323(1)(g) [fraud or deceit, or of negligence, incompetency, or misconduct, *in the practice of public accounting*] and (h) *F.S.* [violation of any rule adopted pursuant to Chapters 473 or 455 *F.S.*] and Rule

21A-24.001(1)(g) *F.A.C.* Therein, Ibanez was prosecuted for her use of the CFP designation as a specialty designation on her business cards and in her yellow pages listing. In Count III, Ibanez was prosecuted for using her CPA designation in such a way that it is "misleading," in that she has allegedly represented to the public that she abides by all provisions of Chapter 473 *F.S.* Count III specifically charged Ibanez pursuant to Section 473.323(1)(f) [advertising goods or service sin a manner which is fraudulent, false, or misleading in form or content] and again pursuant to Sections 473.323(1)(g) and (h) *F.S.* and apparently under *all* of the sections of Rule 21A-24.001 *F.A.C.*

25. Assuming, *arguendo*, that Ibanez had been found to be "practicing public accounting" so as to be subject to the advertising rule, she still could not be found guilty of committing any violation thereof alleged under Counts II or III upon the facts in this record. Either because of her active CPA licensure or because Ibanez has, in fact, earned the CPA and CFP credentials or because the rule sections simply do not apply, Ibanez' situation does not fall within Sections (1)(a) through (f) or Section (1)(h) of Rule 21A-24.001 *F.A.C.* With regard to the remaining sections of that rule, (1)(j), (g), and (i), the Board's opinions have declared "CFP" to be an unrecognized specialty of public accounting. The Board also has never recognized the IBCFP. However, the Board has promulgated no rule concerning "CFP" specifically and has failed to prove up any rationale for its policy with regard to "CFP" or "certified financial planner" contained in its letter opinions. Ms. Rice's testimony belied any suggestion that the CFP

designation used with the CPA designation *implies* specialization in public accounting or misleads the public to that effect. Certainly, Ms. Rice did not *infer* that Ibanez' use of the abbreviation "CFP" "held out" a specialty of public accountancy. With further regard to (1)(g) of that rule, it should be recognized that Ibanez has not stated on her cards or in the yellow pages that CFP is an accountancy specialty or that by obtaining that credential, she is a specialist in public accounting, and DPR has stipulated that for purposes of Section 21A-24.001(1)(g), "CFP" is not a "self-designation." Rule 21A-24.001(1)(i) specifies that a CPA may not state a non-Board form of recognition using the word, "certified." "CFP" is a form of recognition by an entity other than the Board, but there is no clear and convincing evidence of a violation of Section 21A-24.001(1)(i) since Ibanez has only implied the word "certified" by using the abbreviation "CFP." There also is no proof her use of "CFP" and/or "CPA" and "CFP" has mislead [sic] anyone.

26. Therefore, even *if* Ibanez were practicing public accounting and were therefore subject to the Board, none of the charges alleged under Counts II or III were established in this case.

RECOMMENDATION

Upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Accountancy enter a Final Order that:

(1) Finds Respondent Ibanez is not "holding herself out as a certified public accountant" and

(2) Finds her not guilty of all charges alleged under Counts I through III and dismisses them

DONE and ENTERED this 15th day of January, 1992, at Tallahassee, Florida.

/s/ Ella Jane P. Davis
ELLA JANE P. DAVIS,
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the Division of Administrative Hearings this 15th day of January, 1992.

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS: All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party *at least 10 days* in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. *You should consult with the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order.* Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.

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Case No. 91-4100

APPENDIX TO RECOMMENDED ORDER
CASE NO. 91-4100

The following constitute specific rulings pursuant to Section 120.59(2) *F.S.* upon the parties' respective proposed findings of fact (PFOF):

DPR's 39 PFOF:

Accepted except where subordinate, unnecessary, or cumulative to the facts as found. Material which falls in any of those categories has *not* been utilized in the recommended order (RO): 1, 9-11, 13-15, 20, 24, 26, 34-36, 38.

Rejected as stated because *as stated* these PFOF are misleading or constitute unreconciled or isolated record evidence or

constitute or contain a conclusion of law (COL) or constitute mere legal argument, but otherwise the subject matter is covered in the RO: 2-3, 12, 25, 27, 31-33, 37, 39.

Rejected as subordinate, unnecessary, or cumulative or otherwise nondispositive of the material issues once Rule 21A-20.012 is invalidated: 16-19, 21-23, 28, 32.

Rejected as immaterial except to the degree covered in the RO: 4-8.

Accepted in part and rejected in part on issues of credibility; covered in the RO: 29-30

Respondent's 56 PFOF:

Accepted except where subordinate, unnecessary, or cumulative to the facts as found. Material which falls in any of those categories or which is material only to the rules challenge case and not this disciplinary case has *not* been utilized in the recommended order (RO): 1-7, 10, 14, 17, 24, 34-35, 40, 42-46, 48-50, 52-56.

Rejected as stated because *as stated* these PFOF are misleading or constitute unreconciled or isolated record evidence or constitute or contain a conclusion of law (COL) or constitutes mere legal argument, but otherwise the subject matter is covered in the RO: 11-13, 15, 19, 27, 39, 47, 51.

Rejected as subordinate, unnecessary, or cumulative or otherwise nondispositive of the material issues in this disciplinary case: 8-9, 16, 18, 20-23, 25-26, 28-33, 36-38.

Rejected as Immaterial: 41.

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AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

473.301 Purpose. The Legislature recognizes that there is a public need for independent and objective public accountants and that it is necessary to regulate the practice of public accounting to assure the minimum competence of practitioners and the accuracy of audit statements upon which the public relies and to protect the public from dishonest practitioners and, therefore, deems it necessary in the interest of public welfare to regulate the practice of public accountancy in this state.

History – ss. 1, 25, ch. 79-202; ss. 2, 3, ch. 81-318; ss. 10, 11, ch. 85-9.

Note – Repealed effective October 1, 1995, by s. 11, ch. 85-9, and scheduled for review pursuant to s. 11.61 in advance of that date.

473.322 Prohibitions; penalties.

(1) No person shall knowingly:

(a) Practice public accounting unless the person is a certified public accountant or a public accountant;

(b) Assume or use the titles or designations "certified public accountant" or "public accountant" or the abbreviations "C.P.A." or any other title, designation, words, letters, abbreviations, sign, card, or device tending to indicate that such person holds an active license under this act, unless such person holds an active license under this act;

(c) Attest as an expert in accountancy to the reliability or fairness of presentation of financial information or utilize any form of disclaimer of opinion which is intended or conventionally understood to convey an assurance of reliability as to matters not specifically disclaimed unless such person holds an active license under this act. This subsection shall not prevent the performance by persons other than certified public accountants of other services involving the use of accounting skills, including the preparation of tax returns and the preparation of financial statements without expression of opinion thereon.

(d) Present as his own the license of another;

(e) Give false or forged evidence to the board or a member thereof for the purpose of obtaining a license;

(f) Use or attempt to use a public accounting license which has been suspended, revoked, or placed on inactive status.

(g) Employ unlicensed persons to practice public accounting; or

(h) Conceal information relative to violations of this act.

(2) Any person who violates any provisions of this section is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083.

History – ss. 20, 25, ch. 79-202; ss. 2, 3, ch. 81-318; ss. 10, 11, ch. 85-9; s. 104, ch. 91-224.

Note – Repealed effective October 1, 1995, by s. 11, ch. 85-9, and scheduled for review pursuant to s. 11.61 in advance of that date.

473.323 Disciplinary proceedings.

(1) The following acts constitute grounds for which the disciplinary actions in subsection (3) may be taken:

(a) Violation of any provisions of s. 473.317, s. 455.227(1), or any other provisions of this act;

* * *

473.317 Competitive negotiation.

(1) A licensee shall not make a competitive bid for a professional engagement in which the licensee will attest as an expert in accountancy to the reliability or fairness of presentation of financial information or utilize any form of disclaimer of opinion which is intended or conventionally understood to convey an assurance of reliability as to matters not specifically disclaimed.

(2) As used in this section, "competitive bid" means the submission of an offer to a prospective client, as distinguished from an existing client, or representative thereof, by a licensee, either orally or in writing, directly or indirectly, as either a prime contractor, a subcontractor,

or a subcontractor using a prime contractor as a conduit, to perform a professional engagement for an estimated fee, a fixed fee, or a basis of fee when the surrounding facts and circumstances indicate that another licensee will be asked to make an offer, has been asked to make an offer, or has been made an offer which has not been rejected to perform the same professional engagement for an estimated fee, a fixed fee, or basis of fee as defined in this section. The performance of an engagement for a specific purpose, which engagement by its nature is not expected to recur, does not create an "existing client" relationship.

(3) The term "subcontractor" as used in this section means a subcontractor whose actions, together with the surrounding facts and circumstances, are in such a manner as to make him a party to a competitive bid or bids, either with respect to a specific engagement or as a result of a series of engagements with the same prime contractor, without regard to whether a subcontract is entered into before or after the bid.

(4) A licensee may respond to any request from a person or entity for a proposal giving qualifications and other factual information, excluding any quotation as to basis of fee.

(5)(a) If a licensee's proposal in subsection (4) is the only proposal received or accepted by a person or entity, the licensee may negotiate a basis of fee for that engagement. If a person or entity receives more than one proposal for the same engagement, the person or entity may rank, in order of preference, the licensee to perform the engagement. The licensee ranked first may then negotiate

a contract with the person or entity giving, among other things, a basis of fee for that engagement. Should the person or entity be unable to negotiate a satisfactory contract with that licensee, negotiations with that licensee shall be formally terminated, and the person or entity shall then undertake negotiations with the second-ranked licensee. Failing accord with the second-ranked licensee, negotiations shall be terminated and undertaken with the third-ranked licensee. Negotiations with the other ranked licensees shall be undertaken in the same manner. Once negotiations have been undertaken with a subsequent licensee, a licensee shall not contract with the requesting person or entity for the same engagement.

(b) The Legislature or the governing body of a municipality, in negotiating with licensees with respect to an audit engagement, may reopen formal negotiation with any one of the three top-ranked firms.

History – ss. 16, 25, ch. 79-202; ss. 1, 2, ch. 81-194; ss. 2, 3, ch. 81-318; s. 3, ch. 83-265; ss. 10, 11, ch. 85-9; s. 2, ch. 86-102.

Note – Repealed effective October 1, 1995, by s. 11, ch. 85-9, and scheduled for review pursuant to s. 11.61 in advance of that date.

455.227 Grounds for discipline; penalties; enforcement.

(1) The board shall have the power to revoke, suspend, or deny the renewal of the license, or to reprimand, censure, or otherwise discipline a licensee, if the board finds that:

* * *

473.323 Disciplinary proceedings.

(1) The following acts constitute grounds for which the disciplinary actions in subsection (3) may be taken:

* * *

(f) Advertising goods or services in a manner which is fraudulent, false, deceptive, or misleading in form or content;

* * *

473.323 Disciplinary proceedings.

(1) The following acts constitute grounds for which the disciplinary actions in subsection (3) may be taken:

* * *

(g) Upon proof that the licensee is guilty of fraud or deceit, or of negligence, incompetency, or misconduct, in the practice of public accounting;

* * *

473.323 Disciplinary proceedings.

(1) The following acts constitute grounds for which the disciplinary actions in subsection (3) may be taken:

* * *

(h) Violation of any rule adopted pursuant to this act or chapter 455;

* * *

21A-20.011 Practice of, or Practicing Public Accountancy

"Practice of, or practicing public accountancy" as defined by Section 473.302(4), F.S., shall exclude any of the following:

(1) Services rendered by a licensee as an employee of a governmental unit or an employee rendering accounting services only to his employer as long as that employer is not required to be licensed under F.S. 473, or

(2) Activities of licensees who do not hold themselves out as certified public accountants and who are not associated with financial statements, or

(3) Activities of licensees who do not hold themselves out as certified public accountants.

Specific Authority: 473.302, 473.304, 473.307, F.S. **Law Implemented**: 473.302, F.S. **History**: New 12-4-79, Amended 9-17-84, 1-25-87.

21A-20.012 Holding Out

"Holding himself or itself out" as used in F.S. 473.302(4) is defined as publicizing that the licensee is a certified public accountant when providing, or offering to provide services or products to the public, in such manner that an uninformed person may not be able to differentiate whether or not the licensee may also be in the practice of public accounting. The display of the CPA

certificate and license issued by the Department of Professional Regulation shall not constitute holding out under the terms of this rule. All other publications of the fact that a licensee is a CPA constitutes holding oneself out.

Specific Authority: 473.302,473.304, F.S. **Law Implemented**: 473.302, F.S. **History**: New 9-17-84.

21A-21.009 Other Business Activities

A licensee engaged in the practice of public accounting may concurrently engage in other business, occupation, or profession if:

(1) The licensee does not hold himself out as a certified public accountant in that activity,

(2) The activity is conducted under a name which the public will not associate with licensee's practice of public accounting,

(3) The other business, occupation, or profession is not used to promote the practice of public accounting in any manner prohibited by Chapter 473, F.S.,

(4) Facilities used by the licensee in his public accounting practice and other activity conform to the requirements of 21A-26.001(3),

(5) The entity's dealings with the licensee's public accounting clients shall not violate the provisions of

Chapter 473, F.S. and 21A, Florida Administrative Code, relating to integrity and objectivity,

(6) The entity does not interpret financial statements, forecasts or projections audited, reviewed, compiled or prepared by others.

Specific Authority: 473.304, 473.315, F.S. **Law Implemented**: 473.315, F.S. **History**: New 9-16-84.

21A-24.001 Advertising

(1) No licensee shall disseminate or cause the dissemination of any advertisement or advertising which is in any way fraudulent, false, deceptive, or misleading. Any advertisement or advertising shall be deemed by the Board to be fraudulent, false, deceptive, or misleading, if it, among other things:

(a) Contains a misrepresentation of facts; or

(b) Makes only a partial disclosure of relevant facts; or

(c) Creates false or unjustified expectations of beneficial assistance; or

(d) Appeals primarily to a layperson's fears, ignorance, or anxieties regarding his state of financial well-being; or

(e) Contains any representation or claims, as to which the licensee, referred to in the advertising, does not expect to perform; or

(f) Contains any other representation, statement, or claim which misleads or deceives; or

(g) States or implies that the licensee has received formal recognition as a specialist in any aspect of the practice of public accountancy unless he has in fact received such recognition. In the event a licensee uses the term "specialty" or "specialist" or any other term tending to indicate that he specializes in any aspect of the practice of public accountancy in any advertisement must state that the use of the term is a self-designation and is not sanctioned by the state or federal government in any advertisement or offering to the public unless such terms and recognition have been approved by the Board. However, a licensee may indicate the services offered and may state that practice is limited to one or more types of services when this is in fact the case; or

(h) Represents that professional services can or will be competently performed for a stated fee when this is not the case, or makes representations with respect to fees for professional services that do not disclose all variables affecting the fees that will in fact be charged; or

(i) States a form of recognition by any entity other than the Board that uses the terms "certified," "public," "auditor," or "auditing" however, this would not prohibit a licensee from disclosing that he is a CPA in another state or jurisdiction; or

(j) States or implies that the licensee has received formal recognition as a specialist in any aspect of the practice of public accounting, unless the statement contains a disclaimer stating that the recognizing agency is not affiliated with or sanctioned by the state or federal

government. The advertisement must also contain the agency's requirements for recognition, including, but not limited to, educational, experience and testing. These statements must be in the immediate proximity of the statement that implies formal recognition as a specialist.

(2) As used in the rules of this Board, the terms "advertisement" and "advertising" shall mean any statements, oral or written, disseminated to or before the public or any portion thereof, with the intent of furthering the purpose, either directly or indirectly, of selling public accounting services, or offering to perform public accounting services, or inducing members of the public to enter into any obligation relating to such public accounting services. For purposes of this rule, oral or written statements include business cards and letterhead. **Specific Authority**: 473.304,473.323, F.S. **Law Implemented**: 473.323,F.S. **History**: New 12-4-79, Amended 2-3-81, 12-29-83, Formerly 21A-24.01, Amended 5-20-91.

Supreme Court, U.S.
FILED
NOV 26 1993
OFFICE OF THE CLERK

No. 93-639

In The

Supreme Court of the United States

October Term, 1993

SILVIA S. IBANEZ,

Petitioner,

v.

STATE OF FLORIDA, DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, BOARD OF ACCOUNTANCY,

Respondent.

On Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida For The First District

MEMORANDUM FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the State of Florida's interest in the regulation of the practice of certified public accountancy is served by regulating the disclosure of licensure status when that individual licensee refuses to be bound by the regulatory requirements associated with licensure.

PARTIES TO THE PROCEEDING

*State of Florida, Department of Business and Professional Regulation, Board of Accountancy: Petitioner below, Respondent before this Court.

Silvia S. Ibanez: Respondent below, Petitioner before this Court.

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* Formerly, State of Florida, Department of Professional Regulation, Board of Accountancy. Name change by legislative enactment, Chapter 93-220, Laws of Florida, effective July 1, 1993.

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v.

STATE OF FLORIDA, DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, BOARD OF ACCOUNTANCY,

Respondent.

On Petition For A Writ Of Certiorari
To The District Court Of Appeal Of Florida
For The First District

MEMORANDUM FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE AND FACTS

Petitioner, Silvia S. Ibanez, is a practicing attorney, a member of The Florida Bar since 1983, and the sole shareholder and lawyer-employee of her law firm, Silvia S. Ibanez, P.A. She holds an active Florida Certified Public Accountant ("CPA") license, issued by the Florida Board of Accountancy. She became a Certified Financial Planner ("CFP") in 1989. Ibanez is certified as a CFP by the

International Board of Standards and Practices for Certified Financial Planners, the recognized licensing authority of the CFP credential.

In October, 1990, a copy of the "attorney" yellow pages which included Ibanez's listing was mailed to the Florida Board of Accountancy. The advertisement was forwarded to the Florida Department of Professional Regulation ("the Department") and a complaint was opened and investigated. The probable cause panel of the Florida Board of Accountancy found probable cause that Ibanez violated subsections 473.323(1)(a), (f), (g), and (h), Florida Statutes, and Rule 21A-24.001, Florida Administrative Code.

In an Amended Administrative Complaint, the Department charged Ms. Ibanez with violations of subsections 473.323(1)(a), (g), and (h), Florida Statutes, by rendering public accounting services through an unlicensed firm and by appending the CPA designation after her name when providing public accounting services to the public; with violating subsections 473.323(1)(g) and (h) and Rule 21A-24.001 by providing public accounting services and appending the CPA and CFP designations after her name in advertisements; and with violating subsections 473.323(1)(f), (g), (h), and Rule 21A-24.001 by providing public accounting services and by appending the CPA designation after her name in advertisements, when she was not in compliance with the provisions of Chapter 473, Florida Statutes.

Pursuant to section 120.57(1), Florida Statutes, Ms. Ibanez requested and received a formal administrative

hearing on the Amended Administrative Complaint. During the formal hearing, Ms. Ibanez admitted that she held herself out to the public as a CPA. She also admitted during her testimony that her clients considered it "extremely valuable" that she be a CPA and that she considered it valuable to her legal practice to be able to continue advertising that she is a CPA. The Hearing Officer found that Ibanez advertised her professional employment in the yellow pages under the attorney section as "Ibanez, Silvia S. CPA, CFP." In the white pages, Ibanez advertised her professional employment as "Ibanez, Silvia S., CPA, CFP, Atty." In addition, her business card stated "Silvia Safille Ibanez, JD, CPA, CFP." The purpose of these advertisements is to communicate to the public that she is currently licensed as a CPA. The Hearing Officer found that Ibanez's "intent in appending the CPA and CFP credentials . . . to her own name is to indicate [presumably to the public] that she is, in her own right, individually licensed as a CPA and CFP." (Finding of Fact ¶ 16, Petitioner's Appendix 29a).

Testimony was also presented to the Hearing Officer from Elise Rice, a member of the public, and two experts in public accounting. Elise Rice testified that she, as a member of the public, would believe that Appellant was performing both CPA and legal services based on Ibanez's advertisement. (Finding of Fact ¶ 20, Petitioner's Appendix 30a). The two accounting experts testified that Ibanez was engaged in the practice of accountancy by performing accounting services and by advertising her CPA status in the yellow pages and on her business cards, thus offering to perform services for the public that CPAs perform. Finally, the Department established that Ms.

Ibanez's professional firm was not licensed by the Florida Board of Accountancy.

The Department also established that Ms. Ibanez advertised her CFP status in conjunction with her CPA designation. The term "certified," which is implied in CFP, is prohibited by Rule 21A-24.001, Florida Administrative Code, when used in conjunction with the term "CPA" by a CPA in relation to rendering public accounting services.

The Hearing Officer also found that:

> The use of the term "CPA" implies a specific competency to the public. The fact that Ibanez is a CPA is valuable to her legal clients. CPA status is a valuable property right to each CPA, and the ability of the practicing attorney to publicize the fact that s/he holds an active CPA license is a valuable asset to that individual.

(Finding of Fact ¶ 14, Petitioner's Appendix 28a). Yet, the Hearing Officer submitted a recommended order which ultimately concluded that Ibanez was not holding herself out to be practicing public accountancy and recommended that all charges against Ibanez be dismissed.

Contrary to Ms. Ibanez's assertions, the Florida Board of Accountancy did not disregard the Hearing Officer's Findings of Fact contained in the Recommended Order. Other than modifications to five paragraphs, the Board adopted all of the Hearing Officer's Findings of Fact. In the Findings of Fact that were adopted by the Board, the Hearing Officer found that Ibanez currently provides through her professional practice

> all types of tax services to her clients, including tax opinion work, representation before the Internal Revenue Service, evaluation of the tax consequences of certain transactions . . . [and] financial counseling and planning for her clients, utilizing her professional education and experience in both public accounting and the law.

(Findings of Fact ¶ 11, Petitioner's Appendix 27a). The Hearing Officer also found, based on Ms. Ibanez's admission, that she performed "substantially similar work" when she worked as a CPA at two accounting firms prior to her admission to The Florida Bar. (Finding of Fact ¶ 12, Petitioner's Appendix 28a).

Based on these findings, the Board rejected the Hearing Officer's Conclusions of Law and instead adopted the Conclusions of Law set forth in the Final Order, finding Ms. Ibanez violated subsections (a), (f), (g), and (h), of section 473.323(1), Florida Statutes, and Rule 21A-24.001, Florida Administrative Code. Based on these conclusions, the Board imposed a reprimand but granted a stay until the completion of any appellate proceedings.

Ms. Ibanez appealed the final order of the Florida Board of Accountancy to the District Court of Appeal, First District of Florida, which affirmed the Board's decision, without opinion, on June 9, 1993. Ms. Ibanez's request for rehearing was denied on July 28, 1993. (See Petitioner's Appendix A and B). On September 23, 1993, Ibanez requested the Board to stay her reprimand pending disposition of her Petition for Writ of Certiorari. The motion was denied.

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT WARRANT REVIEW BY THIS COURT.

This case does not warrant review by this Court. The decision below is not in conflict with any ruling by a federal court or the highest court of any state. The issues presented are not sufficiently weighty to deserve the Court's attention. The provisions in question do not constitute a blanket suppression of commercial speech, but rather are reasonable regulations on the use of this speech. The ruling below is entirely consistent with this Court's rulings in *Edenfield v. Fane*, 507 U.S. ___, 113 S. Ct. 1792, 123 L.Ed.2d 543, (1993), and *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91 (1990). Furthermore, the decision below comports with the requirements of the four-pronged test for determining constitutionality of governmental regulations of commercial speech articulated in *Central Hudson Gas and Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). The petition for writ of certiorari should be denied.

II. THE DECISION BELOW IS NEITHER A BLANKET SUPPRESSION OF COMMERCIAL SPEECH NOR IS IT VIOLATIVE OF THE FIRST AMENDMENT OR THIS COURT'S DECISIONS.

Ms. Ibanez asserts that the truthful disclosure of her professional credentials is constitutionally protected commercial speech and that the Florida Board of Accountancy's statute and rule regulating advertising is unconstitutional under the First Amendment of the

United States Constitution. She argues that being prevented from using the term CPA unless she subjects herself to licensure and regulation by the State somehow constitutes an infringement of her commercial speech rights under the First Amendment. Such an assertion is incorrect.

The State of Florida created the term CPA when it passed Chapter 473 and its predecessor statutes. The term clearly indicates that the holder has received licensure from the State and is subject to state regulation. *Compare Abramson v. Gonzalez*, 949 F.2d 1567 (11th Cir. 1992). Having received CPA registration, Ms. Ibanez's use of that term is subject to the State's continued technical, educational, and licensure requirements. Claiming to be a CPA while engaging in the practice of accountancy is inherently misleading if one is not currently licensed to practice public accountancy or refuses to be bound by the requirements of Chapter 473. The First Amendment provides no protection in either event. *See also United States v. DeFusco*, 930 F.2d 413 (5th Cir.), *cert. denied*, ___ U.S.___, 112 S. Ct. 239, 116 L.Ed.2d 194 (1991)(First Amendment does not protect defendant's publishing activities in misleading victims into believing they had won a contest).

In *Friedman v. Rogers*, 440 U.S. 1, *rehearing denied*, 441 U.S. 917 (1979), this Court upheld a Texas law which prohibited the use of trade names by optometrists. Substantial evidence had been presented to show that the term was being used by certain professionals to mislead the public as to ownership and management of optometry businesses. Finding that the prohibition ensured the communication of accurate information, the Court stated:

> [T]he restriction on the use of trade names has only the most incidental effect on the content of the commercial speech of Texas optometrists. . . . Since the Act does not prohibit or limit the type of informational advertising held to be protected in *Virginia Pharmacy* and *Bates*, the factual information associated with trade names may be communicated freely and explicitly to the public. An optometrist may advertise the type of service he offers, the prices he charges, and whether he practices as a partner, associate, or employee with other optometrists. *Rather than stifling commercial speech, [the Act] ensures that information regarding optometrical services will be communicated more fully and accurately to the consumers than it had been in the past. . . . In sum, Texas has done no more than require that commercial information about optometrical services "appear in such a form . . . as [is] necessary to prevent its being deceptive." [Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24, 48 L.Ed.2d 346, 96 S. Ct. 1817 (1976).

440 U.S. at 16 (emphasis added). In accordance with the yardstick set forth in *Friedman* and *Virginia Pharmacy*, the State's regulation of the use of CPA neither infringes Ms. Ibanez's commercial speech rights nor violates the First Amendment.

The State has not banned Ms. Ibanez's use of the CPA designation. It may, however, regulate the use of the term CPA without violating the First Amendment. In *Central Hudson Gas and Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), this Court articulated a four-prong test for determining the constitutionality of governmental regulations of commercial speech. The test requires that first,

the speech at issue must concern a lawful activity and not be misleading; second, the restriction on commercial speech must serve a substantial governmental interest; third, the regulation must directly advance the asserted governmental interest; and fourth, the regulation must be no more extensive than necessary to advance such an interest. *Id.* at 566.

In the final order of the Florida Board of Accountancy, the Board analyzed Ms. Ibanez's advertisements in light of *Central Hudson*'s four-prong test. The first prong of the *Central Hudson* test is that speech at issue must concern a lawful activity and not be misleading. Ms. Ibanez responds by stating that including her CPA and CFP credentials in her advertising was both truthful and verifiable, and therefore not subject to "blanket suppression" by the State. She further asserts that her appending her certifications to her name in advertising was not potentially or inherently misleading. Ms. Ibanez, however, misstates the findings by the Florida Board of Accountancy. The Board of Accountancy actually found that Ms. Ibanez "has, in effect, told the public that she is subject to the provisions of Chapter 473, and the jurisdiction of the Board of Accountancy when she believes and acts as though she is not," and concluded that such advertising is inherently misleading. (Petitioner's Appendix 11a).

The second prong of the *Central Hudson* test is that the state must assert a substantial interest served by the restriction on commercial speech. In her Petition, Ms. Ibanez does not argue that the State has no substantial governmental interest in ensuring that those who hold themselves out to the public as CPAs remain subject to

the licensure and regulation by the State. Instead, she asserts that the State has no substantial interest in "totally suppressing Petitioner's advertising of her CPA and CFP credentials." This assertion misstates both the law and the facts. The Florida Board of Accountancy rule on advertisements is in no way a blanket prohibition on a CPA from advertising the fact that she is a CPA. Rather, the Board rule makes clear that such an advertisement is permissible where it is neither fraudulent, false, deceptive nor misleading. Rule 21A-24.001, Florida Administrative Code. The rule further clarifies that if the advertising states or implies that the licensee has received formal recognition as a specialist in any aspect of the practice of public accounting, the statement is prohibited unless accompanied by a disclaimer that the recognizing agency is not affiliated with or sanctioned by the state or federal government. Furthermore, the rule requires that the requirements to achieve such recognition, such as education or examination, be immediately proximate to the statement of recognition as a specialist. The State's continued imposition of regulations and standards of conduct ensure that CPAs provide accounting services in a competent, professional, and ethical manner. Clearly, the State has a substantial interest in ensuring that only those persons who subject themselves to the regulation of the practice of public accounting advertise their qualifications as certified public accountants.

In *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91 (1990), the Court invalidated a provision which prevented an attorney from advertising the attainment of certified trial advocate from an organization not associated with the state. The Court

reiterated that with the First Amendment, "disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information." 496 U.S. at 108. *See also Bates v. State Bar of Arizona*, 433 U.S. 350, *rehearing denied*, 434 U.S. 881 (1977)(remedy for potentially misleading information is to use disclaimers); *In re R.M.J*, 455 U.S. 191 (1982)(restriction on advertising should be no broader than necessary). However, the issue that was not presented in *Peel* is now before this Court: whether the State's substantial interest in the regulation of its professions is served by regulating the disclosure of licensure status when that individual refuses to be bound by the regulatory requirements associated with licensure.

Unlike the issue which was presented in *Peel*, publication of CPA status not only implies attainment of having met the requirements for such, but also implies the continued regulation and licensure of the CPA by the State. Indeed, it is this continued imposition of regulations and standards of conduct which ensures that CPAs provide accounting services in a competent, professional, and ethical manner. Clearly and undoubtedly, the State has a real and substantial interest in assuring that practitioners who advertise their status as a CPA remain subject to the State's licensure and regulation requirements.

The third element requires that the regulation directly advance the governmental interest. *Central Hudson*, 477 U.S. at 566. Florida requires that CPAs who engage in the practice of public accounting while holding out as a CPA be subject to the licensure and regulation of the State. By requiring CPAs to be subject to the State's

licensure and regulations, the State is acting in a direct and causal manner to further its interest of ensuring that those CPAs who hold themselves out as practicing public accountancy are in fact competent to do so. Holding oneself out as a professional not only represents that the individual has a license to practice that particular profession, but also represents that the licensee is subject to sanctions for any deficiencies in the practice of the profession.

In *Accountant's Society of Va. v. Bowman*, 860 F.2d 602 (4th Cir. 1988), the court stated:

> The state has an interest in assuring the public that only persons who have demonstrated their qualifications as certified public accountants and received a license can hold themselves out as certified public accountants. The Supreme Court has held that "advertising for professional services may be prohibited when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse." *R.M.J.*, 455 U.S. at 203, 102 S. Ct. at 937. We believe that use of the title "public accountant" by a non-CPA fairly could be characterized as inherently misleading, given the possibility, accurately stated by the district court, that "some members of the public would believe the title . . . has the state's imprimatur."

Id. at 606.

Similarly, in *Grandee v. Glaser*, 785 F. Supp. 684 (S.D. Ohio 1992), licensed hearing aid fitters sought to use the term "certified hearing aid audiologists" in order to

advertise their services. The state restricted the term "audiologist" to only those audiologists who had passed a rigorous educational and certification process, even though hearing aid fitters could perform many of the same services as the licensed audiologists and fit within the definition of that term. Rejecting the First Amendment challenge, the court found the use of the term "audiologist" by the hearing aid fitters to be inherently misleading:

> [T]he court believes that the use of the term "audiologist" by a hearing aid dealer is likely to materially deceive or mislead consumers as to the dealer's educational level. Such deception is "material" in that it is likely that consumers would find the education level of such an individual an important consideration, and one that would most likely affect a choice.

Id. at 691. To the extent that Ms. Ibanez is seeking to trade upon her CPA license to obtain professional employment while at the same time refusing to comply with Chapter 473 for the provision of those services, this case mirrors *Grandee*.

The fourth element of the *Central Hudson* analysis, that the regulation be no more extensive than necessary to advance the State interests, is clearly met here. The regulation under review simply requires those who hold themselves out as CPAs and who provide public accounting services remain subject to licensure and regulation by the State. The regulation is directly tied to the State's interest and is no more extensive than necessary. As such, it passes the fourth prong. *See Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989).

Finally, Petitioner argued below that she can overcome the effects of her advertising by verbal and visual disclaimers, rather than the required written disclaimer. This conduct also may be prohibited as being inherently misleading. *See United States v. DeFusco*, 930 F. 2d 413 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 239, 116 L.Ed.2d 194 (1991); *Bowman*, 860 F.2d at 605-606. Moreover, the State cannot, as a matter of public policy, regulate on the hope that a licensee will provide the proper disclaimers at the appropriate time. Requiring the written disclaimer is a reasonable restriction which ensures that the information the public receives is complete and accurate.

The State seeks to ensure responsible advertising. Ms. Ibanez freely admits that she seeks to append the CPA after her name because her status as a CPA is valuable to her legal clients and that her practice would suffer if she could not. It is axiomatic that when she holds herself out in her current professional practice as a CPA performing accounting services, she holds herself out not only as a CPA, but as a CPA licensed and regulated by the State in that capacity. For the foregoing reasons, the regulation challenged is not a violation of the First Amendment.

As to Ms. Ibanez's CFP status, clearly, the State's interests in her advertisement of such status is the same, and the restriction directly advances the State's concern. Because the terms CPA and CFP, when used in conjunction with each other are so similar, the State may regulate their use so as not to create confusion in the minds of the public as to whether such designation is licensed by the State. Justice Marshall, in his concurrence in *Peel* also noted that it would be misleading for a state to permit a

CPA to advertise his license in conjunction with another designation that contained the term "certificate" as the public might believe that government authorization or certification had been provided. 496 U.S. at 113.

Finally, Ms. Ibanez argues that she is being treated differently from other attorney-CPAs in Florida for no explicable reason. The extent of those licensees' compliance with the applicable rules and statutes is not in the record in this case and is not relevant to this Court's review.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

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Supreme Court, U.S.
FILED
NOV 19 1993
OFFICE OF THE CLERK

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Respondent.

On Petition For Writ Of Certiorari
To The District Court Of Appeal Of Florida
For The First District

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION OF ATTORNEY-CERTIFIED PUBLIC ACCOUNTANTS, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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No. 93-639

In The

Supreme Court of the United States

October Term, 1993

SILVIA S. IBANEZ,

Petitioner,

v.

STATE OF FLORIDA, DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF ACCOUNTANCY,

Respondent.

On Petition For Writ Of Certiorari
To The District Court Of Appeal Of Florida
For The First District

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION OF ATTORNEY-CERTIFIED PUBLIC ACCOUNTANTS, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CONSENT OF THE PARTIES

Petitioner, Silvia S. Ibanez, and Respondent, State of Florida, Department of Professional Regulation, Board of Accountancy, have consented to the participation of the American Association of Attorney-Certified Public Accountants, Inc. in these proceedings as amicus curiae in support of the petition for writ of certiorari. Their consents have been filed with this Court.

INTEREST OF AMICUS CURIAE

The American Association of Attorney-Certified Public Accountants, Inc. ("AAA-CPA" or "the Association") is a not-for-profit corporation, formed in 1964 and now headquartered in California, with members located all over the United States. Every member has been licensed as both an attorney and a certified public accountant ("CPA").

AAA-CPA is dedicated to ensuring that its members observe the highest professional and ethical standards in service to their clients and the public. At the same time, AAA-CPA supports the right of practitioners to disclose truthful information about their qualifications, and to engage in the practice of either or both of their professions.

AAA-CPA is active in advocating the rights of individuals, such as its members, who are dually licensed both as attorneys and as CPAs. The Association asserts the right of these individuals to identify themselves as being licensed to practice both professions, and to engage in the practice of either or both, provided these individuals comply with the applicable standards of professional conduct.

AAA-CPA is in a unique position to appreciate the differences between the professional duties of attorneys on the one hand, and CPAs on the other. Because of these differences in professional duties, the state has a legitimate interest in regulating each profession by a distinctive set of standards. These standards are similar in some respects and different in others. Depending on the nature of the engagement, dual licensees must comply with one

set of standards, or the other, or both. Dual licensees can discern and conform to the applicable set of standards, in much the same way as attorneys engaged in the multistate practice of law can discern and conform to the standards of each applicable jurisdiction.

Although one set of standards governs attorneys and another set governs CPAs, a single pervasive principle applies with equal force to the regulation of each profession: The state should impose no restriction unless required by the public interest. When the regulation affects truthful speech, the applicable test is even more stringent: The state should impose restrictions only in narrowly defined situations and only in response to a demonstrated need to protect a substantial public interest.

In the decision in this case, the Florida Board of Accountancy reprimands Silvia Ibanez for truthfully identifying herself as an attorney, CPA and CFP (Certified Financial Planner). The Board's actions violate Ibanez's First Amendment rights and endanger the rights of all practitioners who hold more than one professional license. AAA-CPA supports the position of Ibanez in seeking this Court's review and reversal of the judgment of the Florida District Court of Appeal which, without opinion, affirmed the Board's decision.

SUMMARY OF ARGUMENT

I. THE BOARD USES AN INNOVATIVE RATIONALE FOR IMPAIRING IBANEZ'S FIRST AMENDMENT RIGHTS

II. THE BOARD'S DECISION ENDANGERS THE RIGHTS OF ALL INDIVIDUALS WHO HOLD MORE THAN ONE PROFESSIONAL LICENSE

ARGUMENT

In the decision at issue in this case, the Florida Board of Accountancy ("the Board") improperly reprimands Silvia Ibanez ("Ibanez") for truthfully identifying herself as an attorney, a Certified Public Accountant ("CPA"), and a Certified Financial Planner ("CFP").

Amicus curiae, the American Association of Attorney-Certified Public Accountants, Inc. ("AAA-CPA"), has been informed that the International Board of Standards and Practices for Certified Financial Planners, Inc. ("IBCFP") will file its own brief as amicus curiae, supporting Ibanez's right to identify herself truthfully as a CFP. AAA-CPA joins IBCFP in supporting her right to do so, based on commercial speech decisions such as *Peel v. Attorney Disciplinary Commission*, 496 U.S. 91 (1990) and *Edenfield v. Fane*, 507 U.S. ___, 113 S. Ct. 1792 (1993). To avoid needless overlap with the IBCFP brief, the present brief by AAA-CPA focuses on Ibanez's right to identify herself truthfully as an attorney and a CPA.

The Board improperly characterizes Ibanez's truthful identification, as an attorney and a CPA, as "deceptive, false and misleading." This characterization is based only

on the Board's speculation that Ibanez may violate the rules which, according to the Board, require her to license her law firm as a CPA firm, to forego certain forms of remuneration, and to limit the ownership of the firm to other CPAs. Pet., p. 11a. By characterizing truth as deception and by imposing discipline on this basis, the Board impairs Ibanez's First Amendment rights and endangers the rights of all practitioners who hold more than one professional license.

I. THE BOARD USES AN INNOVATIVE RATIONALE FOR IMPAIRING IBANEZ'S FIRST AMENDMENT RIGHTS

The Board's action is innovative and unprecedented. Although the Board's order cites a number of cases, none of them supports the Board's action. If allowed to stand, the Board's action will establish a dangerous precedent.

A. The Board characterizes Ibanez's truthful listing of professional credentials as "deceptive, false and misleading"

In its order reprimanding Ibanez, the Board acknowledges that she is licensed as an attorney and a CPA. The Board holds, however, that her truthful identification as an attorney and a CPA is "deceptive, false and misleading." Pet., pp. 11a-12a. This holding violates Ibanez's First Amendment right to engage in truthful commercial speech, for reasons discussed under the following headings.

B. The Board misapplies case law

The Board's order cites a number of cases in support of its action. None of them supports the Board's action.

1. This Court's cases on commercial speech

First, the Board relies on this Court's decisions in *Peel v. Attorney Disciplinary Commission*, 496 U.S. 91 (1990), *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n. of New York*, 447 U.S. 557 (1980), and *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989). For reasons stated in Ibanez's Petition for Certiorari, none of the above decisions supports the Board's action.

The Board's decision is further undermined by this Court's subsequent decision in *Edenfield v. Fane*, 507 U.S. ___, 113 S. Ct. 1792 (1993), also discussed in the Petition. To avoid needless overlap with the Petition, this brief will not further discuss these cases.

2. Other courts' cases on title acts

The Board relies also on a number of lower court decisions arising from statutes described as "title acts," which prohibit unlicensed persons from using professional titles. Pet., pp. 7a, 10a, 15a. None of these cases, however, supports the Board's position.

The Board relies on *Abramson v. Gonzales*, 949 F.2d 1565 (11th Cir. 1992) (state may prohibit unlicensed psychologist from identifying publicly as "licensed psychologist," but same individual has First Amendment right to identify publicly as "psychologist"); *Accountants' Society*

of Virginia v. Bowman, 860 F.2d 602 (4th Cir. 1988) (state may prohibit unlicensed accountant from identifying publicly as "certified public accountant," "CPA," or "public accountant"); *Smith v. California*, 336 F.2d 530 (9th Cir. 1964) (state may prohibit unlicensed engineer from identifying publicly as "electrical engineer" or "consulting engineer").

These three cases support the right of a state legislature to prohibit *unlicensed* persons from using certain professional titles. That proposition is not disputed in the present case. None of the cases relied on by the Board supports the right of the state to prohibit a *licensed* person from using her titles. Accordingly, the cases do not support the Board's order.

C. Ibanez's truthful listing of credentials is not a representation regarding the regulatory regime governing her practice

The Board explains why it characterizes Ibanez's truthful listing of her professional credentials as "deceptive, false and misleading." In essence, the Board's explanation has two components: (1) By publicly identifying herself as a CPA, Ibanez represents to the public that she will comply with all of the Board's rules; and (2) The Board speculates that Ibanez may violate some of its rules. In the Board's own words, Pet. p. 11a:

> Respondent [Ibanez] has, in effect, told the public that she is subject to the provisions of Chapter 473 [the Florida Accountancy Law], and the jurisdiction of the Board of Accountancy when she believes and acts as though she is not [footnote omitted].

1. Truthful, not deceptive

The Board's explanation is untenable. By publicly identifying herself as a CPA, Ibanez merely represents that she now holds a valid license which authorizes her to use that title. Since the Board concedes that she holds a valid license, the Board has no basis for impairing her right to identify herself publicly as a CPA, or for characterizing her identification as deceptive. Her public identification is truthful.

2. Public identification, not representation regarding regulatory regime

Ibanez's public identification as an attorney and a CPA is not a representation regarding the regulatory regime governing her professional practice. Defining the appropriate regime may be a complex matter which cannot feasibly be conveyed by the listing of professional credentials.

For example, a person licensed as both an attorney and a CPA obviously may not serve the same client as both legal counsel and independent auditor, because of the different professional roles of counsel (as advocate and adviser) and auditor (as independent examiner). The dual licensee must therefore decline to accept engagements that would violate this principle, while remaining free to accept the wide range of other engagements in which attorney-CPAs may properly and usefully serve their clients. But the need to decline certain engagements has no bearing on the right of a person licensed as both an attorney and a CPA to use these credentials as a means

of public identification. A dual licensee is not required to describe the need to decline certain engagements when publicly listing professional credentials.

Dual licensees face other issues, some of them even more complex. One source of complexity arises because in Florida, as in virtually all states, attorneys are regulated by the state Supreme Court while CPAs are regulated by the Board, an administrative agency. In the event of conflict between these two sources of regulation, issues may arise under the separation of powers provision of the state constitution. The potential emergence of these issues, however, has no bearing on Ibanez's right to identify herself truthfully as an attorney and a CPA. And in listing her professional credentials, Ibanez need not describe or discuss these issues.

D. The Board improperly bases its decision on speculation that Ibanez may violate its rules

The Board's order speculates that Ibanez may violate its rules. Mere speculation, however, is not a sufficient justification for restricting Ibanez's commercial speech.

If the Board has sufficient reason to do so, it may bring formal charges against Ibanez, accusing her of past or continuing violations of specific rules. She will then receive the elaborate procedural protections of the Florida Administrative Procedure Act as well as the due process guarantees of the state and federal constitutions. In these proceedings she will have the opportunity to raise her defenses, including any appropriate challenge to the Board's jurisdiction to enforce its rules against a CPA who is not engaged in the practice of public accounting.

If the Board finds, in such proceedings, that Ibanez has indeed violated specific rules, the Board may impose the discipline authorized by statute, subject to judicial review. If that discipline consists of the revocation of her license, she will then be prohibited from identifying herself as a CPA. Until then, Ibanez is a CPA and is entitled to identify herself as one.

II. THE BOARD'S DECISION ENDANGERS THE RIGHTS OF ALL INDIVIDUALS WHO HOLD MORE THAN ONE PROFESSIONAL LICENSE

The Board's decision, affirmed without opinion by the District Court of Appeal, poses a significant danger to the First Amendment rights of all individuals who hold more than one professional license, in Florida and throughout the United States.

A. The Board's decision will receive wide publicity, although the Florida appellate court affirmed without opinion

1. Channels of publicity

The Board's decisions, like those of other Florida administrative agencies, are published and available to the media and the general public. The Board publishes "Quarterly Statement," a newsletter reporting information of interest to CPAs, including summaries of the Board's disciplinary actions.

The Board is affiliated with the National Association of State Boards of Accountancy ("NASBA"), which serves as a clearinghouse for information and ideas of general concern to state boards. Through NASBA and other networks, the Board's action in this case is likely to come to the attention of boards in other states.

The Florida Institute of Certified Public Accountants ("FICPA"), a voluntary organization, publishes its own newsletter, "Florida CPA Today." This publication has already prominently featured the issue raised in this case. Lloyd "Buddy" Turman (FICPA Executive Director) & Kenneth R. Hart (FICPA General Counsel), *When You Say You're A CPA, You Must Play By The Rules . . . All The Rules*, FLORIDA CPA TODAY, Oct. 1992, at 8 (reprinted, with permission of FICPA, in 29 THE ATTORNEY-CPA, No. 1, Winter 1993, at 6).

FICPA is affiliated with the American Institute of Certified Public Accountants ("AICPA") and many Florida CPAs are members of AICPA. News of the Board's action is likely to circulate throughout the AICPA.

Further, many Florida CPAs practice in offices that are affiliated with national firms. These firms provide additional channels for the spread of news about the Board's action in this case.

2. The Board's reputation for repression

The Board's decisions on commercial speech issues are likely to attract nationwide attention, since the Board has a reputation for trying to repress truthful communications by CPAs. The Board has lost a number of cases in

this area, including *Edenfield v. Fane, supra* (Board's anti-solicitation rule held invalid as applied to truthful, non-coercive solicitation in the business context); *Dep't. of Professional Regulation, Board of Accountancy v. Rampell*, 621 So.2d 426 (Fla. 1993) (Board's anti-competitive bidding rule held invalid); *Cenac v. Florida State Board of Accountancy*, 399 So.2d 1013 (Fla. 1st Dist. Ct. App. 1981) (Board's revocation of CPA's license reversed, since Board did not explain its rejection of findings by hearing officer on question whether accountant had held out as a CPA – noted in Board's order, Pet. p. 8a, n. 3); *Ibanez v. State Board of Accountancy*, Fla. Div. of Admin. Hearings, Case No. 91-3336R (Jan. 15, 1992) (Board's "holding out" rule invalidated, by independent hearing officer, as arbitrary and capricious – noted in Board's order, Pet. p. 8a, n. 4).

B. The Board's decision is likely to encourage other regulators to repress public identification or practice by individuals who hold more than one professional license

The Board's decision, if allowed to stand, is likely to affect the rights of attorney-CPAs and other individuals who hold more than one professional license.

1. Attorney-CPAs

During the 29 years of AAA-CPA's existence, attorney-CPAs have faced restrictions on their right to practice and their right to identify their professional credentials. Until 1980, the restrictions came primarily from the American Bar Association ("ABA"). Since then, the

restrictions have come from the accountancy boards of a few states, including Florida.

AAA-CPA's quarterly newsletter, "The Attorney-CPA," documents this history in considerable detail. The following discussion mentions some highlights.

Restrictions imposed by ABA

Starting in 1932, ABA interpretations of the 1908 Canons of Professional Conduct prohibited attorneys from engaging in other businesses. ABA Informal Op. 1422 (1978) (historical summary). The clear purpose of these prohibitions was to prevent the non-law business from "feeding" clients to the law practice. Many states chose to ignore the ABA's position on this issue.

The ABA adopted the Model Code of Professional Responsibility in 1969 (effective January 1, 1970). The Model Code included a Disciplinary Rule, DR 2-102(E), representing a significant departure from the ABA's prior position. DR 2-102(E) allowed an attorney to engage in another profession or business, subject to one proviso – the lawyer could not identify the other business or profession on the letterhead, office sign or professional card of the law practice, nor could the lawyer be identified as a lawyer in any publication in connection with the other business or profession. Thus the ABA Model Code permitted dual practice but prohibited identification as a dual practitioner.

In 1977 this Court decided *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), conferring First Amendment protection on certain types of advertising by lawyers. In the aftermath of *Bates*, the ABA overhauled its rules on

advertising. At first DR 2-102(E), prohibiting identification as a dual licensee, was left intact. In 1980, however, the ABA repealed DR 2-102(E), apparently in the belief that the rule was incompatible with *Bates*. Proceedings of ABA 1980 Mid-Year Meeting, 105 ABA ANNUAL REPORTS 287, 341 (1985).

The ABA Model Rules of Professional Conduct, adopted in 1983 to replace the Model Code, include no prohibition against identification as dual licensee. ABA Informal Op. 83-1497, n. 2 (1983) (commenting on this aspect of the then-pending Model Rules).

State courts and bar committees have adopted the permissive stance now taken by the ABA. During the past decade, dual licensees have encountered few if any restrictions from bar regulators. Significantly, The Florida Bar has not objected to Ibanez's identification as CPA and CFP in the telephone yellow pages under the heading "Attorneys." Only the Florida Board of Accountancy objects; the Board's reprimand precipitated the present lawsuit.

Restrictions imposed by accounting regulators

In 1946, the American Institute of Accountants ("AIA," predecessor of AICPA) endorsed the right of attorney-CPAs to practice both professions. American Institute of Accountants, Committee on Professional Ethics, *Official Text*, May 8, 1946, 83 J. ACCTCY. 171 (1947). At the time, AIA prohibited CPAs from advertising, as did state boards and voluntary societies of CPAs throughout the country.

After *Bates*, states could no longer prohibit advertising. The Florida Board then developed a new theory in

the hope of restricting dual practice or identification of dual credentials without running afoul of *Bates* and this Court's later cases on commercial speech.

According to the Board's new theory, a CPA who publicly "holds out" that credential thereby engages in the "practice of public accounting," and is consequently governed by all the Board's rules. While the present case was pending before the Board, an independent hearing officer in separate proceedings held the Board's "holding out" rule invalid. *Ibanez v. State Board of Accountancy, supra*. The Board then abandoned its reliance on the "holding out" rule. Instead, the Board characterized Ibanez's listing of her credentials as "deceptive," based on the Board's speculation that she might violate some of the Board's rules.

The Board's position in the present case is innovative and unprecedented. Many states, however, have adopted their own "holding out" rules, to the effect that a CPA who holds out this credential thereby engages in the practice of public accountancy. The Uniform Accountancy Act, drafted in 1992 by AICPA and NASBA, includes a "holding out" rule similar to Florida's. American Institute of Certified Public Accountants & National Association of State Boards of Accountancy, *Uniform Accountancy Act*, Section 3(g) (1992), 1 C.C.H. ACCOUNTANCY L. RPTR. par. 1035 (looseleaf). The Uniform Act is now under serious consideration in many states.

If the Board's interpretation of the Florida "holding out" rule is allowed to stand, regulators wishing to repress speech in other states may engraft a similar interpretation on their version of the "holding out" rule, or

AICPA and NASBA may even insert a similar interpretation in the Uniform Act.

2. Other multiple licensees

This brief has focused on the individual who is dually licensed as an attorney and a CPA. The significance of the present case goes further, and extends to any individual who is licensed in more than one profession.

The ABA's restrictions on dual practice (until 1970) and dual identification (until 1980) applied to lawyers who engaged in *any other* business or profession. See, for example, ABA Informal Op. 1248 (1972) (lawyer-psychologist), ABA Informal Op. 83-1497 (1983) (lawyer-physician), ABA Informal Op. 1422 (1978) (identification of lawyer in a publication about another profession or business); ABA 1980 Mid-Year Proceedings, *supra* (lawyer-Ph.D.). While the ABA no longer imposes these restrictions, this history illustrates various other professions in which lawyers have engaged. The present case is also relevant to non-lawyers who are licensed in two or more professions.

Any person who has the talent, persistence and integrity to qualify for two or more professional licenses, and to retain these licenses in good standing, is put at risk by the Board's decision in the present case. The public interest is served by allowing individuals who hold multiple licenses to practice each profession in

which they are licensed, and to convey truthful information about their credentials.*

The Board's decision, repressing truthful identification of professional credentials, is contrary to the public interest and impairs First Amendment rights. The decision should be reversed.

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* See, for example, Philip D. Brent, *Accounting and Law: Concurrent Practice Is In the Public Interest*, 123 J. Acctcy., Mar. 1967, at 38; Louis S. Goldberg, *Dual Practice of Law and Accountancy: A Lawyer's Paradox*, 1966 Duke L. J. 117; Louis S. Goldberg, *A Lawyer's Multiple Occupations*, 6 Wake Forest Intramural L. Rev. 191 (1970); Morris W. Primoff, *The Dual Practice of Law and Accounting and the Public Interest* (Ph.D. dissertation, Calif. Western Univ., 1977, published by AAA-CPA).

CONCLUSION

For the reasons stated above, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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November 18, 1993

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Supreme Court, U.S.
FILED
NOV 24 1993
OFFICE OF THE CLERK

No. 93-639

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SILVIA S. IBANEZ,

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STATE OF FLORIDA, DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF ACCOUNTANCY,

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On Petition For Writ Of Certiorari To The District Court Of Appeals Of Florida For The First District

BRIEF AMICI CURIAE OF THE INTERNATIONAL BOARD OF STANDARDS AND PRACTICES FOR CERTIFIED FINANCIAL PLANNERS, INC., AND CENTRAL FLORIDA SOCIETY, SOUTH FLORIDA SOCIETY, AND SOUTHWEST FLORIDA SOCIETY OF THE INSTITUTE OF CERTIFIED FINANCIAL PLANNERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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CONSENT OF THE PARTIES

Petitioner, Silvia S. Ibanez, and Respondent, State of Florida, Department of Business and Professional Regulation, Board of Accountancy, have consented to the participation of the International Board of Standards and Practices For Certified Financial Planners, Inc., and the Central Florida Society, the South Florida Society and the Southwest Florida Society of the Institute of Certified Financial Planners, in these proceedings as amici curiae in support of the petition for writ of certiorari. Their consents have been filed with this Court.

INTEREST OF AMICI CURIAE

The International Board of Standards and Practices for Certified Financial Planners, Inc. (IBCFP) is a private, not-for-profit standards-setting, credentialing, licensing and disciplinary body for Certified Financial Planner and CFP licensees. The mission of the IBCFP is to benefit and protect the public by setting qualifications for initial professional certification, protect its federally registered service marks CFP and CERTIFIED FINANCIAL PLANNER, to develop and administer continuing post-certification requirements and disciplinary procedures for licensees, and to encourage both certification attainment and certification retention of those persons licensed, thereby enhancing the professionalism of those engaged in the exercise and pursuit of financial planning.

The nature and function of the IBCFP organization is more fully described as follows. IBCFP identifies the body of knowledge in the field of personal financial planning; sets the core curriculum for the field based on national job task analyses of persons in the practice of personal financial planning; develops and administers national certification examinations which tests entry level

competency of those desiring to earn the IBCFP professional designation; registers educational institutions (presently over forty-nine colleges and universities have registered their programs), that provide the prerequisite personal financial planning educational programs required for certification; promulgates a Code of Ethics and Professional Responsibility to which all licensees are obliged to subscribe; and administers disciplinary action up to and including revocation against those licensees violating its code of ethics. In its initial licensure requirements, in its post-certification requirements, and in its requirements to comply with the IBCFP Code of Ethics and Professional Responsibility, the IBCFP demands professionalism of its licensees.

The CFP and CERTIFIED FINANCIAL PLANNER marks were first placed in commerce during the early 1970's by the College for Financial Planning, a Denver-based educational institution. They are distinct, federally registered service marks, which are not synonymous with one another. The IBCFP was created by the College for Financial Planning and the Institute of Certified Financial Planners in 1985 and was given ownership of the federally registered service marks, CFP and CERTIFIED FINANCIAL PLANNER, in 1986. By 1988, it could be said that "the CFP designation was the most prominent professional qualification of planners and product sales employees, held by 26% of the planner employees and 25% of the product sales employees . . . . The CFP designation appears to be developing as the most recognized designation in the planning field."[1]

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[1] *See* Financial Planners: Report of the Staff of the United States Securities and Exchange Commission to the House Committee on Energy and Commerce's Subcommittee on Telecommunications and Finance, 53 (February 1988) (Financial Planners Study).

The IBCFP at present has approximately 27,000 persons nationwide which it has licensed to use both of its marks (CFP and CERTIFIED FINANCIAL PLANNER), all of whom have met its examination, experience, education and ethics requirements, and who continue to meet its post-certification requirements which include continuing education requirements. Approximately 4,500 of these persons are dually licensed both as Certified Public Accountants (CPAs) and CFP licensees. In the State of Florida, approximately 1,400 persons are CFP licensees and over 200 are additionally licensed as CPAs.

An applicant for the CFP or CERTIFIED FINANCIAL PLANNER designation, such as the Petitioner (Ibanez) must complete an educational program registered with the IBCFP in six general areas of personal financial planning, must have experience in the area of financial services, must pass a rigorous examination on these six subject matter areas of personal financial planning, and must not only sign an ethics declaration agreeing to abide by the IBCFP Code of Ethics and Professional Responsibility, but must also disclose any previous or then-existing ethics violations or investigations by any regulatory or self-regulatory organization.

By virtue of its ownership of the federally registered service marks CFP and CERTIFIED FINANCIAL PLANNER, the IBCFP controls, and is obligated to control use of its marks by licensing their use only to those who meet its requirements, as previously described. The IBCFP has not delegated or assigned control and oversight of its ownership rights in these marks to any State body, specifically not to the State of Florida, Department of Business and Professional Regulation, Board of Accountancy

(BOA). The CFP mark neither states nor implies that the holder has received formal recognition in any other field or specialty. Indeed, personal financial planning is generally considered to be a completely separate profession. Specifically, the CFP mark is not considered by the IBCFP to be a specialty of the practice of public accounting or to be a specialty of CPAs. The American Institute of Certified Public Accountants (AICPA), which is a national voluntary membership organization of CPAs, has more recently developed its own specialty designation for its members who meet its requirements which is called "Personal Financial Specialist". That designation is awarded by the Specialization Accreditation Board of the AICPA and is in no way connected with the IBCFP designations, CFP and CERTIFIED FINANCIAL PLANNER.

The Central Florida Society, the South Florida Society and the Southwest Florida Society of the Institute of Certified Financial Planners (Florida Societies) are affiliated societies of the Institute of Certified Financial Planners (ICFP). The ICFP is a not-for-profit membership association of CFP licensees that calls on its members to aspire to the highest levels of ethical conduct, personal development, professional competence, and service to the public. The Societies are local bodies which assist the ICFP in pursuit of its goals for member education and public awareness by providing a credible source for financial planning information and for promotion of the CFP licensees to members, the general public and regulators. Membership in the Central Florida Society of the ICFP currently numbers approximately 110 CFP licensees, in the South Florida Society 77, and in the Southwest Florida Society 33. Many of their members are CPAs in addition to being CFP licensees.

It is the mutual concern of the IBCFP and the three Florida Societies that if this order of the BOA is permitted

to stand, it will establish an unfortunate precedent in each of the following respects, which this Court should not condone or affirm:

(1) If other disciplines are permitted to enforce a blanket suppression on use of the CFP and CERTIFIED FINANCIAL PLANNER credentials, by persons qualified by the IBCFP to use the marks, consumers will be denied information as to professionally qualified planners who are best able to help them with their problems. Consumers will suffer because: (a) they are unable to ascertain professionals with the most appropriate qualifications; and (b) because this precedent will discourage additional financial planners from seeking the additional qualifications and self-regulatory constraints that the CFP designation represents.

(2) Beyond the immediate infringement of Ibanez's First Amendment rights, this order poses imminent and significant dangers to important First Amendment rights of each of the 200 CPA-CFP licensees practicing in Florida, and exposes each to similar risk of unwarranted discipline.

(3) In addition, because of the likelihood of nationwide publicity about the BOA's order, all of the 4,500 CPA-CFP licensees who practice outside the State of Florida stand to be placed at similar risk of losing important First Amendment rights as other states may seek to emulate the Florida BOA action.

STATEMENT

Petitioner, Silvia S. Ibanez, is a practicing attorney and a member of the Florida Bar since 1983. Petitioner (Ibanez) is also a licensed Certified Public Accountant (CPA). Ibanez was licensed to use the marks CERTIFIED FINANCIAL PLANNER and CFP in 1989. Ibanez has been actively licensed as a CFP licensee in good standing

with the IBCFP, the recognized licensing authority for the CFP credential. Pet. App. 25a. The IBCFP was created to improve the quality of financial planning by providing a national credentialing process. The IBCFP certifies individuals who meet specified standards of experience, education and ability in financial planning.

Ibanez was listed in the "Attorney" yellow pages as "Ibanez, Silvia S., CPA, CFP." She was also listed in the white pages as "Ibanez, Silvia S., CPA, CFP, atty." *Id.*, at 26a.

A person anonymously mailed to the BOA a copy of the yellow pages, which included Ibanez's listing, and circled her name. The BOA then instituted disciplinary action against Ibanez. The basis for the discipline is violation of F.A.C. 21A-24.001 which prohibits CPAs, inter alia, from advertising any "form of recognition by any entity other than the board that uses the term 'certified' . . . ." *Id.*, at 5.

On January 15, 1992, a hearing officer issued a recommended order that all charges against Ibanez be dismissed. *Id.*, at 7. The BOA subsequently disregarded the recommendation and found Ibanez in violation of Rule 21A-24.001. *Id.*, at 9. Ibanez appealed, but the decision was affirmed per curiam. *Id.*, at 10.

SUMMARY OF ARGUMENT

1. Truthful statements of certification, professional qualifications, and specialization are valuable commercial information. The BOA's categorical prohibition of truthful certification claims by CPAs and restrictions on the use of specialization claims violate the standards for commercial speech under the First Amendment. Certification provides valuable information to consumers concerning the nature of services available from competing professionals. Claims of certification are true and verifiable and,

absent evidence to the contrary, they are not actually or inherently misleading. Although claims of certification have the potential of misleading, this does not justify a state's regulation categorically prohibiting the use of such claims.

2. The BOA's restrictions on truthful professional and specialization claims, which are not within the practice of public accounting, further violates the First Amendment. Such restrictions go well beyond the proper scope and extent of restrictions designed to achieve a legitimate governmental interest.

3. The BOA's rule prohibiting CPAs from advertising the fact that they are certified by anyone other than the BOA insulates CPAs from competition in violation of the Sherman Act and, as such, is an unfair method of trade in violation of the Federal Trade Commission Act. The BOA's rule barring CPAs from advertising their validly held CFP designations increases consumer difficulty in finding the least expensive CPA with the most relevant knowledge. CPAs, thus, have no incentive to price competitively.

ARGUMENT

I. Certified Public Accountants have a constitutional right, under the standards for commercial speech, to advertise their truthful certification by the IBCFP as a CFP and CERTIFIED FINANCIAL PLANNER licensee.

Although the First Amendment provides less protection to commercial speech than to non-commercial speech, this Court has recognized the importance of commercial speech in a competitive market. Commercial information enables consumers to make better informed judgments in procuring services of professionals. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1976). In recognition of

the importance of commercial speech, this Court's approach has been that states may only proscribe dissemination of commercial speech which is false, misleading or deceptive. *Zauderer v. Office of Disciplinary Counsel*, 105 S.Ct. 2265 (1985).

Commercial speech which is not false, misleading or deceptive and does not concern unlawful activities may be restricted (a) only to achieve a substantial government interest, and (b) only with restrictions that directly advance that interest, and (c) are no more extensive than necessary to effectuate that interest. *Central Hudson Gas and Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980).

Recently, in *Peel v. Attorney Disciplinary Commission of Illinois*, 496 U.S. 1989 (1990), this Court considered the validity under the First Amendment of a disciplinary rule adopted by the State of Illinois which prohibited attorneys from claims of certification and specialization.

Peel, an attorney licensed to practice in Illinois, Arizona and Missouri, placed on his letterhead stationery, between his name and the states in which he was licensed to practice, the following statement: "Certified Civil Trial Specialist by the National Board of Trial Advocacy." *Id.*, at 96. The Attorney Registration and Disciplinary Commission of Illinois (ARD) found Peel in violation of the rule prohibiting attorneys from claiming specialization and certification and recommended censure. *Id.*, at 97.

On review, this Court's analysis began with the observation that advertising was a form of commercial speech protected by the First Amendment. *Bates v. Arizona*, 433 U.S. 350 (1977). Although the First Amendment protects truthful advertisements, misleading advertising may be entirely prohibited. Further, states may not place an absolute prohibition on advertising that is potentially misleading if the information may be conveyed in a way

that would not be deceptive. However, even non-misleading advertisements may be regulated, but the state must assert a substantial interest and the interference must be in proportion to the interest served. *In re R.M.J.*, 455 U.S. 191 (1982).

This Court then held that Peel's certification was true and verifiable. *Peel*, 496 U.S., at 100. Peel's claim of certification was not actually misleading because there were not factual findings of actual deception or misunderstanding. *Id.*, at 106. Although this Court concluded that claims of certification "may not be fully understood" by consumers and, therefore, may be potentially misleading, the state's blanket prohibition was broader than necessary to prevent the harm. *Id.*, at 107. "Even if we assume that petitioner's letterhead may be potentially misleading to some consumers, that potential does not satisfy the state's heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public." *Id.*, at 109.

This Court then specifically stated: "A State may not . . . completely ban statements that are not actually or inherently misleading, *such as certification as a specialist by a bona fide organization* such as NBTA." *Peel*, 496 U.S., at 110.

A. The Board of Accountacy regulation prohibiting "certified" is analogous to the fact situation of Peel and therefore is unconstitutional.

In *Peel*, this Court held unconstitutional the ARD's rule categorically prohibiting use of truthful certification by a bona fide national organization. This Court reasoned that the ARD's categorical prohibition of the term "certified specialist" did not satisfy the *Central Hudson* test and

was, therefore, unconstitutional. Although the government interest of protecting consumers from false or misleading advertising is substantial, this Court held that an absolute prohibition was more extensive than necessary to effectuate that interest.

As in *Peel*, the BOA promulgated F.A.C. 21A-24.001 1(i), a blanket prohibition on the use of the term certified, on grounds of protecting the public from false and misleading advertising. Ibanez, like Peel, holds a certification (CFP) from a bona fide national organization (IBCFP). Ibanez lists her CFP designation on her letterhead, business card and in the yellow pages. The BOA like the ARD in *Peel*, seeks to discipline Ibanez for the use of truthful, commercial speech.

The importance of truthful, commercial free speech in the field of financial planning is even more important than in other fields because of consumer needs and marketplace forces. Financial planning and other types of investment advisory services are in demand by consumers at all levels of income and sophistication.[2] Because of the exponential growth in the industry and its relative lack of regulation, the opportunity for clients of all sizes and levels of sophistication to be harmed is significant. (*Ibid.*) At present, the principal government regulatory mechanism for financial planners occurs under the SEC administered Investment Advisers Act of 1940, and under similar state statutes. Unqualified financial planners are a significant problem (*Id.* at 20) for consumers, and the existence of an ascertainable, independent certification in this field is valuable and rare in a competitive marketplace. So is full disclosure of material information about the financial planning practitioner to

[2] *See* H.R. Rep. No. 103-75, 103D Cong., 1st Sess. 18 (1993).

consumers. Under the IBCFP *Code of Ethics and Professional Responsibility,* disclosure required of CFP licensees exceeds requirements under federal and state regulations.

One of the purposes of the IBCFP is to lessen the burden of government by cooperating with and assisting state and federal regulatory agencies to appropriately, effectively and uniformly regulate professional financial planners. Present regulation of financial planners is not adequate because it is not sufficiently comprehensive, and fails to incorporate diverse disciplines such as securities, insurance and banking which are merging into one field of financial service and financial planning. As explained in the Interest section, above, the CFP designation is designed to answer the need for qualified and competent financial planners, by establishing comprehensive certification criteria which help set CFP licensees apart from other financial planners, and by positioning the IBCFP as the standard-setting organization for CFP licensees. The BOA rule will deny all 200 Florida CPA-CFP licensees the ability to identify themselves as CPA-CFP licensees to Florida consumers who are thereby denied access to this important information.

As in *Peel*, the BOA's blanket prohibition of certification claims is broader than necessary to achieve the governmental objectives and may not stand.

B. The present case is also distinguishable from *Peel* and is, therefore, more offensive to commercial speech.

The BOA has no statutory authority to regulate other professions, such as financial planning, over which the BOA has no jurisdiction. The BOA's Rule 21A-24.001(1)(g)-(j) raises additional issues which directly affect the First Amendment rights of the approximately

200 CPA-CFP licensees who practice in the State of Florida.

The IBCFP has not sought approval of the CFP designation from the State of Florida Board of Accountancy as referred to in paragraph 1(g) of Rule 21A-24.001, F.A.C., nor does the IBCFP plan in the future to request such approval for Florida CFP licensees, either for those who are also CPAs or not. The reason that the IBCFP has not in the past requested such approval, nor plans to do so in the future, is because the IBCFP believes that it, and it alone, has the right to control the use of its federally registered service marks CFP and CERTIFIED FINANCIAL PLANNER. The IBCFP believes that the BOA (or any other private or government entity) does not have the right to control the use of its marks. The profession of personal financial planning is separate and distinct from the practice of public accountancy just as is the practice of law, architecture and engineering.

There are several important issues here. The BOA rule prohibits the use of specialty designations in any aspect of the practice of public accountancy unless the advertisement states that the use of the term is a self-designation and/or is not sanctioned by the state or federal government. The only exception is if the terms and recognition have been approved by the BOA and, to our knowledge, no such terms or recognition have been so approved.

The BOA also presumes to make personal financial planning a subset of the practice of public accountancy. The IBCFP maintains this is clearly not the case. It is a completely distinct and separate profession from that of public accountancy.

In addition, the CFP and CERTIFIED FINANCIAL PLANNER marks are federally registered marks owned by the IBCFP, as indicated earlier. The IBCFP, and only

the IBCFP, can control the use of its marks. Any interference by any other organization or regulatory authority in the free use of these marks in interstate commerce constitutes an abridgement of our licensees' commercial free speech rights to provide truthful information to the public about designations or licenses that they have in fact earned. And, any attempt to control the free use of a professional designation actually earned and currently owned is, per se, anticompetitive in nature.

In measuring its rules and decision in this case against this Court's test for regulations on protected commercial speech, set forth in the *Central Hudson* case, the BOA claims that its rules are a "reasonable fit" (Pet. App. 13a, 19a) between the public good and the limitations it has imposed on commercial speech. We believe this BOA assessment is in error. It is in error when it claims use of CFP by the Petitioner was inherently deceptive and misleading advertising. Furthermore, it is in error in claiming a "reasonable fit." The restraining effect of its orders and its rules on the use of the CFP designation, a legitimate and recognized certification and designation, utilized in a field which is distinct from the practice of public accountancy, surpasses by a wide margin the *Central Hudson* standards for the proper scope and extent of restrictions designed to achieve a legitimate governmental interest.

II. The Board of Accountancy's restriction prohibiting Certified Public Accountants from listing their CFP and CERTIFIED FINANCIAL PLANNER designation in advertising is anticompetitive in violation of the Sherman Antitrust Act and the Federal Trade Commission Act.

Petitioner's appellate briefs to the Florida District Court of Appeals, First District, in addition to reiterating

First Amendment issues discussed above, have asserted that the BOA's restriction on her truthful use of CPA and CFP designations is anticompetitive and interferes with interstate commerce. Pet. 11-12. While there was no ruling in that court, and the BOA did not rule on this issue, it remains important to ask if the BOA, in issuing its decisions and its rules in the present case, has acted solely out of concern for the public interest.

The Sherman Antitrust Act, 15 U.S.C. §§ 1-7, makes agreements "in restraint of trade" and "monopolization" illegal. Its purpose is to maintain competition as the rule of American trade and commerce. It is based on the belief that competition results in the best allocation of resources and stimulates research and development.

The Federal Trade Commission Act (FTCA), 15 U.S.C. §§ 41-77, created the Federal Trade Commission (FTC). The FTC is responsible for the interpretation and enforcement of the FTCA and the Sherman Act. Section 5 of the FTCA, 15 U.S.C. § 45(a)(1), makes unlawful any unfair methods of competition.

The Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade . . . " 15 U.S.C. § 1 (1982). If the state regulation is the product of a "combination" or "conspiracy" and is unreasonably anticompetitive, it violates § 1 of the Sherman Act. State boards have previously been held to constitute combinations or conspiracies whose acts are scrutinized under the Sherman Act. *Rhode Island Board of Accountancy*, 107 F.T.C. 293 (1986); *Montana Board of Optometrists*, 106 F.T.C. 80 (1985). Similarly, the Florida Board of Accountancy constitutes a combination or conspiracy under the Sherman Act.

The next step in the analysis is to inquire whether the regulation is unreasonably anticompetitive. Advertising is vitally important in a competitive market. It informs

consumers of price, quality, and quality of goods and services. It plays an "indispensable role in the allocation of resources in a free enterprise system." *Bates v. State Bar of Arizona*, 433 U.S. 350, 364. Restraints on truthful advertising for professional services are inherently likely to produce anticompetitive effects. *Massachusetts Board of Registration in Optometry*, No. 9195 (Initial Decision F.T.C. June 23, 1986). Florida's rule banning CPAs from using their CFP credential increases the consumer's difficulty in finding the most inexpensive CPA with the most relevant knowledge. As a result, CPAs are isolated from competition, and there is no incentive to price competitively.

This Court has developed two doctrines to determine whether regulations are unreasonably anticompetitive, the "*per se* and the *rule of reason* doctrines. The *per se* rule is applied when 'the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.' *Broadcast Music, Inc., v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979). In such circumstances, a restraint is presumed unreasonable without inquiry into the particular market context in which it is found." *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 100 (1984).

Under the rule of reason, the test for legality is whether the restraint merely regulates an industry or whether it suppresses and destroys competition. *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918). The Board's rule prohibiting CPAs from using validly obtained certification in advertising may have been intended to regulate the profession, but it clearly suppresses competition among CPAs in taking away the competitive advantage that a CPA-CFP licensee has over a CPA. Because the restraint has anticompetitive effects, under the *rule of reason* doctrine the BOA has a heavy burden to demonstrate the existence of a procompetitive

justification. NCAA 468 at 113. Absent this countervailing procompetitive interest, the BOA's regulation limiting consumers' choice by impeding access to pertinent information cannot survive.

Section 5 of the FTCA makes unfair methods of trade illegal. Violations of the Sherman Act are violations of Section 5 of FTCA. *F.T.C. v. Cement Institute*, 333 U.S. 683 (1948).

This Court has created an exception to the antitrust laws for action taken by or at the direction of state governmental bodies, the "state action doctrine." *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), held that when a state legislature adopts legislation, its actions constitute those of the state and are exempt from the antitrust laws. Subsequently, this Court held that actions of a state supreme court acting legislatively, rather than judicially, are immune from the Sherman Act under the state action doctrine as well. *Bates v. State Board of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977). It is clear that where the action is by the state legislature or court, the exemption is complete without further inquiry. *Hoover v. Ronwin*, 466 U.S. 558, 104 S.Ct. (1989), 80 L.Ed.2d 590 (1984).

Closer scrutiny is required where the activity is not carried out by the legislature or Supreme Court, but is carried out by others pursuant to state authorization. *Community Communication Co. v. Boulder*, 455 U.S. 40, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982); *California Retail Liquor Dealer Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). "A state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State articulated a clear and affirmative policy to allow the anticompetitive conduct, and second, the state provides active supervision of anticompetitive

conduct undertaken by private actors." *F.T.C. v. Ticor Title Ins. Co.*, 112 S.Ct. 2169, 2175 (1992).

The Florida laws do give several legislative directives to the Florida BOA but they do not articulate a "clear and affirmative" policy to allow anticompetitive conduct. They are as follows:

A. Sec. 473.304 Fla.Stat. – Rules of Board
   The board shall adopt all rules necessary to administer this act. Every licensee shall be governed by this act and the rules adopted by the board.

B. Sec. 473.323(1)(f) Fla.Stat. – Disciplinary Proceedings
   (1) The following acts constitute grounds for which the disciplinary actions in subsection (3) may be taken:
   . . .
   (f) advertising goods or services in a manner which is fraudulent, false, deceptive, or misleading in form or content;

C. Sec. 455.201 Fla. Stat. – Professionals and Occupations regulated by the Department of Professional Regulation; legislative intent.
   . . .
   (2) The Legislature further believes that such professions shall be regulated only for the health, safety and welfare of the public under the police powers of the state. Such professions shall be regulated when:
   (a) Their unregulated practice can harm or endanger the health, safety and welfare of the public, and when the potential for such harm is recognizable and *clearly outweigh any anticompetitive impact* which may result from licensing. (emphasis added).

. . .

> (3) No board within the Department of Professional Regulation shall create unreasonably restrictive and extraordinary standards that deter qualified persons from entering the various professions. *No board shall take any action that tends to create or maintain an economic condition that unreasonably restricts competition, except as specifically provided by law* (emphasis added).

These laws in no way manifest a clear intent to create an anticompetitive atmosphere. Because there is no clear intent by the legislature, the BOA cannot claim immunity under the state action doctrine. Therefore, their regulation is subject to both the Sherman Act and the FTCA, and under either the regulation is prohibited.

CONCLUSION

The BOA's order and regulations prohibiting CPA-CFP licensees from advertising their claims of certification is in violation of important First Amendment protections for commercial speech and is anticompetitive in violation of the Sherman Act and the Federal Trade Commission Act. Clarity and consistency of rulings in this area are necessary, and hence this Court should grant Ibanez's petition for writ of certiorari.

Respectfully submitted,

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November 24, 1993

Supreme Court, U.S.
FEB 28 1994

No. 93-639

In The

Supreme Court of the United States

October Term, 1993

SILVIA S. IBANEZ,

Petitioner,

v.

STATE OF FLORIDA,
DEPARTMENT OF PROFESSIONAL REGULATION,
BOARD OF ACCOUNTANCY,

Respondent.

On Writ Of Certiorari
To The District Court Of Appeal Of Florida
For The First District

JOINT APPENDIX

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Petition For Certiorari Filed October 25, 1993
Certiorari Granted January 14, 1994

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1/15/92	Final Order, Hearing Officer/Rule Challenge #91-3336R
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STATE OF FLORIDA

Board of Accountancy

BE IT KNOWN THAT

Silvia Safille Ibanez

has passed all examinations and has met all of the other requirements prescribed by law and by the rules of this Board for qualification as an expert public accountant, and is, therefore, entitled to append the letters C. P. A. after this registrant's name to evidence registration by this Board as a

Certified Public Accountant

IN WITNESS WHEREOF, the said Board grants this certificate, No. 10842 under its seal this 2nd day of April, A.D. 1982.

ATTEST

Louis W. Doorn — Chairman

William W. McAlpin

Daryl Sward

Ignacio J. Cadenas — Vice-Chairman

Richard B. Shor

Newton Greene

Judith G. Baker

Board of Accountancy.

♦ Attorneys—(Cont'd)

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[p. 113] STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF PROFESSIONAL REGULATION,

Petitioner,

vs. CASE NO. 91-4100

SILVIA IBANEZ,

Respondent,

_____/

PROCEEDINGS:	Disciplinary Hearing
HEARING OFFICER:	ELLA JANE P. DAVIS
DATE:	August 27, 1991
LOCATION:	DOAH The DeSoto Building 1230 Apalachee Parkway Tallahassee, Florida 32399-1550
REPORTED BY:	L. CAROLYN BILBREY Court Reporter

[p. 114] APPEARANCES

TOBI PAM, Attorney at Law, Senior Attorney Department of Professional Regulation, 1940 N. Monroe Street, Tallahassee, Florida 32399; appeared on behalf of the Petitioner.

MICHAEL SAMPSON, Attorney at Law, PO Box 32092 Lakeland, Florida 33802: appeared on behalf of the Respondent.

SILVIA S. IBANEZ, Attorney at Law, 659 Avenue A, N.W., Winter Haven, Florida 33881; appeared on behalf of the Respondent.

ALSO PRESENT:
MARTHA WILLIS
LOFTON WESTMORELAND

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[p. 116] THE HEARING OFFICER: We're here before the Division of Administrative Hearings on a case, Department of Professional Regulation, Petitioner, against Silvia Ibanez, Respondent; Case No. 91-4100.

My name is Ella Jane P. Davis. I'm the hearing officer assigned to this cause. May I have your appearances, please, on behalf of Petitioner – DPR?

MRS. PAM: Tobi Pam, DPR.

THE HEARING OFFICER: Mrs. Pam, do you have an agency representative with you?

MRS. PAM: Yes, I do. Louis Dooner.

THE HEARING OFFICER: Very well. Welcome, Mr. Dooner.

MR. DONNER [sic]: Dooner, D-O-O-N-E-R.

THE HEARING OFFICER: All right. And for Ibanez.

MR. SAMPSON: Michael Sampson and Silvia Ibanez for respondent. May I inquire about the representative for the Department here? It's my understanding that Mr. Dooner is not on the Board of Accountancy.

MR. DOONER: Is now –

MR. SAMPSON: Is not.

MR. DOONER: That's correct.

THE HEARING OFFICER: What is Mr. Dooner's [p. 117] capacity?

MRS. PAM: He's here as an expert.

THE HEARING OFFICER: Well, is he employed by the agency? Is he an examiner for DPR or something like that?

MRS. PAM: He's on contract with the Department.

THE HEARING OFFICER: Well, if he's only here as an expert witness, I think where Mr. Sampson is going is you want to impose the rule.

MR. SAMPSON: Yes, I do want to invoke the rule.

THE HEARING OFFICER: If he's just being on contract for purposes of this case, Mrs. Pam, it does not make him a designated agency representative, and if the rule is being invoked –

MR. SAMPSON: It is.

THE HEARING OFFICER: Then at the close of opening exercises, I'm going to excuse him.

MRS. PAM: Okay.

THE HEARING OFFICER: Do you have someone else that you wish to designate as an agency representative to sit with you through this?

MRS. PAM: I'll designate Martha Willis.

THE HEARING OFFICER: I'm not trying to encourage you to do that. I'm giving you an [p. 118] opportunity –

MRS. PAM: I understand that.

THE HEARING OFFICER: Okay. Is she with us?

MRS. PAM: My other two witnesses are sitting in the waiting room.

THE HEARING OFFICER: All right.

MRS. PAM: Would you like them to join us?

THE HEARING OFFICER: It will probably be easier to bring everybody in, and we'll swear the witnesses, if the rule is going to be invoked.

MR. SAMPSON: One housekeeping matter – I have sitting with us someone who is not a witness today, but he is Mrs. Ibanez's Counsel in connection with related proceedings to those that are before you. This is Mr. Lofton Westmoreland.

THE HEARING OFFICER: Mr. Westmoreland is not going to testify?

MR. SAMPSON: No, he's here as an attorney.

THE HEARING OFFICER: Well, that's just fine. Welcome, to you, sir.

MR. SAMPSON: I just wanted you to know who everyone is.

THE HEARING OFFICER: I'm sure they've already told you, I will probably massacre your name, too. I apologize.

[p. 119] MR. SAMPSON: Here's his card.

THE HEARING OFFICER: Ladies and gentlemen, this is a disciplinary proceeding, pursuant to 120.57(1), Florida Statutes, and we'll proceed upon the amended administrative complaint.

The duty to go forward, and the burden of proof is upon the agency. And the burden of proof is by clear and convincing evidence under the Affairs against Turlington Doctrine.

This case was originally consolidated with a rule challenge to Rule 21A-20.012, Holding Out Rule; was bifurcated on an emergency basis, and there was a prior ruling in that case, or in both cases when consolidated, that it would be appropriate and I would consider the adoption of testimony from the rules case into the disciplinary case, the same with exhibits.

Have you folks worked out a way to accomplish that?

MR. SAMPSON: It's been my understanding that if we move to have that done, we could accomplish that, and we will make that motion now. There is nothing in the stipulation to that effect, but I don't know of any objection from Tobi Pam.

MRS. PAM: There is no obligation.

[p. 120] THE HEARING OFFICER: I'm not trying to lead you down the garden path here. I'm trying to save money since, as a result of the emergency, the respondent has had to come all the way back here, and normally would be entitled to have the disciplinary case at least tried in their venue.

Because of the great weight, breadth, depth, et cetera of the exhibits, I would suggest to you that, unless you're going to adopt great hunks of testimony, it might be appropriate simply to give me new copies for purposes of this case.

I would remind you of the prior ruling that – two prior rulings – first, that no rule can be invalidated in the process of the 120.57(1) disciplinary hearing. Consequently, nothing in this case will relate back to the challenge to the holding out rule. And, although I see that you folks tend or want to include a lot of concerning constitutional issues, the application of the other rule 21A-24.001(1)(g) in this case, I cannot invalidate that rule in this proceeding.

Both of those rules have previously been made. I make them again, and remind you of them for purposes of this hearing. Are there any questions with regard to those rules?

[p. 121] MR. SAMPSON: No.

MRS. PAM: No.

THE HEARING OFFICER: Any other motions, or anything else that needs to be taken up with regard to that status? Very well.

The rule has been imposed. What I will do is I will ask that each of you will name the witnesses for me that are here that you are going to call. Then I will explain the rule to them, swear or affirm them, and allow them to go out and wait. Petitioners witnesses?

MRS. PAM: Louis Dooner, Elise Rice, Martha Willis.

THE HEARING OFFICER: Respondent?

MR. SAMPSON: Robert Goss G-O-S-S, Silvia Ibanez, Martha Willis. We may handle Mrs. Willis totally on our cross examination, and we won't need to call her at other portions –

THE HEARING OFFICER: Unless there's some objection to doing it out of order that way, that's perfectly acceptable.

MR. SAMPSON: Okay.

THE HEARING OFFICER: Mr. Dooner, Elise Rice, Martha Willis, Mr. Goss, Mrs. Ibanez, Mrs. Willis again. Very well, folks, you all have probably [p. 122] testified in enough hearings that you've heard this explanation before. There is no intent to talk down to anybody, only to make it very clear.

The rules of evidence, rules of civil procedure provide for what is called the invocation of the rule; sequestration. The earliest that anybody knows that this has ever been applied is in the Apocryphal to the Bible, and all that basically means is the opportunity for each witness to testify to his, or her own truth separate and apart from all other witnesses.

Now, in order to do this under the civil rules, it's necessary for one of the attorneys to invoke the rule. In this case, Mr. Sampson has chosen to do so. That is his absolute right, and by that neither he nor Mrs. Pam, nor I, nor anybody else involved in this hearing is trying to keep you somehow or another locked away in a closet. But, this is an absolute right and it will be imposed in this instance.

In a minute, I will ask you to either swear or affirm to tell the truth in this proceeding. After you have been sworn or affirmed, and you may say either under the law of Florida, we will ask you to wait in the witness room, not discuss this case with anyone except the attorneys for either side; not with [p. 123] any other witness, not with anyone else that comes in and talks to you about the case. You're not to discuss it. That means you don't talk about it. That means you don't let anyone else talk to you about it.

I will try to make this as convenient as possible for everyone. And as each witness testifies, I will ask Counsel if that witness may be excused to go about his or her business because I recognize that this is of greater importance to the litigants than it is necessarily to the witnesses.

But, if that doesn't happen, and if it's necessary for Counsel to ask you to stay on, don't hold it against them, because this is one of the due process rights that each of these folks, the agency and the respondent, are entitled to. We won't take more than this day, I feel reasonably certain, Counsel has assured me of that.

I'd like you to be as comfortable as possible. There are coke machines and other facilities available out there. So, we'll hope that you'll be as comfortable as possible. Just stay where they can get a hold of you and this will go a little bit faster.

If the folks who I have called; Mr. Dooner, Ms. [p. 124] Rice, Mrs. Willis, Mr. Goss, Mrs. Ibanez please raise your right hand. Do you swear that the testimony that you're about to give in this cause, do you swear or affirm,

that the testimony you are about to give in this cause will be the truth, the whole truth, and nothing but the truth.

(Whereupon, the witnesses answered in the affirmative.)

THE HEARING OFFICER: Very well, you are now excused to the other room, everyone except Mrs. Willis and Mrs. Ibanez. Does anyone wish to have oral opening?

MR. SAMPSON: No.

MRS. PAM: No.

THE HEARING OFFICER: Very well. The ball's in your park, Mrs. Pam.

MRS. PAM: Okay. I'll call Louis Dooner.

THE HEARING OFFICER: Very well, if you'll ask him to step back in. Mr. Dooner, if you'd take the hot seat up here. Mr. Dooner, you have previously sworn or affirmed to tell the truth and now it's appropriate for Counsel to inquire.

DIRECT EXAMINATION

BY MRS. PAM:

Q. Please state your name for the record.

[p. 125] A. Louis W. Dooner, D-O-O-N-E-R – L-O-U-I-S.

Q. Can you please give us a brief background of your education and experience?

A. Graduated from the University of Florida in 1953 with a Bachelors Degree in Accounting. Went to work for

an international accounting firm for four years, then a year in private accounting, and the rest of the time in public accounting. I resided in Quincy the last 32 years.

Q. Are you licensed by the Florida Board of Accountancy?

A. Yes, I am.

Q. Can you tell us when you were licensed?

A. 1959.

Q. Do you hold a current active license?

A. Yes.

Q. Can you tell us if you are a member of any associations, and, if so, if you held any positions?

A. I'm a member of the Florida Institute of CPA's, the American Institute of CPA's, National Association of State Board of Accountancy. I'm the past President of the Florida Institute of CPA's. I was a member of the Council of the American Institute of CPA's. I served on the Standards Board of the American Institute, currently serving on the Examination Review Board of the National Association of the State Board of Accountancy.

[p. 126] MRS. PAM: At this time, I'd like to tender Mr. Dooner as an expert witness for discovery in the practice of public accountancy in the state of Florida.

MR. SAMPSON: I'm going to object to the tender of Mr. Dooner in that capacity, with all respect to his experience and his background. In the pre-hearing stipulation, the DPR has stipulated that there are no factual issues to be litigated. If Mr. Dooner is being

tendered to opine on the validity and the enforcement in this case of the rules against Mrs. Ibanez, we object to that tender for that portion of the tender. There is no foundation that he knows anything about the basis for the amended administrative complaint in this case.

THE HEARING OFFICER: It seems to me, Mrs. Pam, as if you're asking him to invade the province of the finder of fact, and the person in this case, who is going to have to form the conclusions of law, which is myself. He is not a member of the Board. Now, I don't know that he has ever, from your examination, that he has ever drafted any rules either. Do you wish to make a further tender – further voir dire?

MRS. PAM: Okay.

BY MRS. PAM:

[p. 127] Q. Are you a past member of the Florida Board of Accountancy?

A. Yes, I am.

Q. In that capacity, were you involved in preparing for this?

A. Yes.

Q. Were you involved in reviewing informal opinions of the Board?

A. Yes.

Q. Were you involved in interpreting statutes and rules?

A. Yes.

THE HEARING OFFICER: Same objection, Mr. Sampson?

MR. SAMPSON: Same objection. Let me elaborate on the objection. We're talking about a complaint that's been initiated in 1990 by the DPR, and Mr. Dooner is retired, I believe, from the BOA and he is only under contract as an expert with the DPR. He has no knowledge of the facts pertaining to the amended administrative complaint which is not in dispute from the DPR's point.

I think for him to interpret how the laws are applied is an invasion of your job, Madam Hearing Officer, and we object to the tender on that basis.

[p. 128] THE HEARING OFFICER: I'll accept him as an expert CPA, ma'am, but I don't know that there is anyone who is qualified to interpret the rules and statutes in this proceeding besides myself. Will you accept my accepting him as an expert CPA? I won't accept him as tendered, ma'am.

MRS. PAM: You're accepting him as – I don't understand what you're accepting him as.

THE HEARING OFFICER: I'll accept him to testify as an expert with regard to anything that his license permits him to testify to, which is a Certified Public Accountant. But not specifically to interpret the rules or regulations other than as they are written.

MRS. PAM: Okay.

THE HEARING OFFICER: You may inquire.

BY MRS. PAM:

Q. I show you Petitioners Exhibit 1, which is a copy of the respondent's business card.

THE HEARING OFFICER: Petitioner's 1 for identification. Respondents's business card.

MRS. PAM: Yes.

(Whereupon, the documents referred to were marked as Petitioner's Exhibit No. 1 for identification.)

BY MRS. PAM:

[p. 129] Q. From looking at this business card, can you tell us whether the respondent is involved in the practice of public accounting.

A. Yes.

Q. Yes, she is?

A. She is involved in the practice of public accounting.

Q. Can you tell us how you reach that conclusion?

MR. SAMPSON: Objection. This goes to the exact thing we objected to in the tender. He is opining on whether or not that business card constitutes a violation of the rules in question.

THE HEARING OFFICER: Overruled.

MR. SAMPSON: You can answer the question.

THE WITNESS: Appending the CPA to her name says she's in the practice of public accounting.

BY MRS. PAM:

Q. Can you elaborate on that, please?

A. She is telling the public that she is available and offering to perform services that CPA's normally perform.

MRS. PAM: I have no further questions.

THE HEARING OFFICER: Do you wish to move this in evidence?

MRS. PAM: Yes, please.

[p. 130] THE HEARING OFFICER: This is a stipulated exhibit, isn't it, Mr. Sampson?

MR. SAMPSON: Yes.

THE HEARING OFFICER: It is admitted without objection. You may inquire.

(Whereupon, Petitioner's Exhibit No. 1 was received into evidence.)

MR. SAMPSON: Thank you.

CROSS EXAMINATION

BY MR. SAMPSON:

Q. Mr. Dooner, you've been a CPA since 1959?

A. Yes, sir.

Q. And you are currently retired, is that correct?

A. I am partially retired from active practice, yes, sir.

Q. That's not like being partially pregnant, you can be partially retired?

A. I hope so. I have been for five years.

Q. You do consultation work for the DPR?

A. Yes, sir.

Q. Are you compensated for that work?

A. Yes, I am.

Q. What are the terms of your engagement for this case?

A. For this case?

[p. 131] Q. Consulting work you're doing on the Ibanez matter.

A. Under the normal – my ordinary consulting contract, paid at the rate of $75 an hour.

Q. Now, you have indicated, looking at the business card exhibit, which is Petitioner's Exhibit 1, that from that you can discern that Mrs. Ibanez is practicing public accounting, is that fair to say?

A. Yes, sir.

Q. Would you please tell me where on there you are led to believe she is not a lawyer, or not practicing law?

A. I am not led to believe that she is not a lawyer. It says law offices.

Q. It says that pretty clearly, doesn't it – on the card?

A. Uh-huh.

Q. Yet you're indicating that you believe the public would believe she's practicing public accounting from that business card. Where on the card do you see that –

A. The card says –

Q. – indication to the public that she's practicing public accounting?

A. The card says she's a CPA.

Q. Where precisely did it say that?

[p. 132] A. Following her name.

Q. Silvia Ibanez JD, CPA, CFP.

A. Right.

Q. What does the JD mean to you?

A. To me?

Q. Yes.

A. That she has a Juris Doctrate [sic] Degree.

Q. What does the CFP mean to you?

A. I believe it means Certified Financial Planner.

Q. Would you continue down the card. What does the next line read?

A. Law offices.

Q. Have you done any review or study – do you have any empirical data to believe that the public would believe Mrs. Ibanez is practicing public accounting?

A. Do I have empirical data that the public believes that she is practicing public accounting?

Q. Yes.

A. Are you asking me have I personally done a survey of the public and asked them that?

Q. Let me ask you that question. I'm asking a more general question but let me start with that one. Have you done any review in Mrs. Ibanez's case of what the public believes when they see that card about the nature of her practice?

[p. 133] A. No, I have not. I've never seen such a survey.

Q. You haven't performed one, and you haven't reviewed such a survey?

A. No.

Q. Have you seen any data about what is in the minds of the public when they see Mrs. Ibanez's business card?

A. Any data?

Q. With regard to the practice that she's engaged in.

A. No, I have not.

Q. Let me ask you more generally, not from Mrs. Ibanez's case, but in general. Have you seen any data about the effect of using the letters "CPA" in one's business card by an attorney, or any attorney?

A. The inclusion of data, no.

Q. Have you visited Mrs. Ibanez's law offices?

A. No, I have not.

Q. On the issue of empirical data about the public and what's in the minds of the public, you said you haven't seen any studies or surveys done. Do you know if any exist in the files of the Board of Accountancy or with Ms. Elise Rice about what the public believes when they see a business card with the letters CPA on it?

A. No.

[p. 134] Q. During your tenure with the Board of Accountancy, have you ever seen any kind of data about the use of CPA in advertising and the effect on the public?

A. No.

MR. SAMPSON: No other questions.

THE HEARING OFFICER: Redirect?

MRS. PAM: Nothing further.

THE HEARING OFFICER: Thank you, Mr. Dooner. What do you folks want to do with this witness? Would you like him to be excused or do you want him to stay?

MRS. PAM: I want him to stay.

THE HEARING OFFICER: Okay. Mr. Dooner, you heard it. If you wait out there until the next round. Who is your next witness, please.

MRS. PAM: Elise Rice.

THE HEARING OFFICER: Will you call her? Maybe Mr. Dooner could just send her in. Mr. Rice has previously been sworn, you may inquire.

WHEREUPON,

ELISE RICE,

after having been previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MRS. PAM:

[p. 135] Q. State your name for the record.

A. Elise Rice.

Q. And your place of employment.

A. Department of Professional Regulation.

Q. Can you tell us a little bit about your educational background?

A. I graduated from high school and went to one year of vocational school and got an accounting diploma.

Q. Do you have any further education?

A. No.

Q. I show you Petitioner's Exhibit 1, which is the respondent's business card, can you please tell me for what services you think you can go to the respondent?

A. I would say she was a Certified Public Accountant.

Q. Would you think by looking at that card, you could go to her for any other services?

A. It has law offices on there, I don't know. You know, I wouldn't think she was a lawyer. I don't know what CFP is.

MRS. PAM: No further questions.

CROSS EXAMINATION

BY MR. SAMPSON:

Q. Good morning, Ms. Rice. I'm Michael Sampson representing Silvia Ibanez, the person whose business card [p. 136] you just read.

A. Okay.

Q. You've indicated that you believe she is a CPA, looking at the business card.

A. Yes.

Q. You wouldn't think she was a lawyer, is that what you said?

A. From looking at this, no.

Q. Do you see on the card the word "law offices"?

A. Yes.

Q. What does that indicate to you?

A. That she works at law offices.

Q. Do you know what the letters JD mean?

A. No.

Q. If you were to engage the services of any nature of Mrs. Ibanez, just having seen this business card, what efforts would you make to contact her to see whether she would handle the work you wanted to engage her for?

A. I'm not sure I understand what you're – if I wanted her for something other than a public accountant?

Q. For any service.

A. I would call to see what she was.

Q. Would you tell her what it was you wanted to engage her for, the kind of work you wanted her to do, and ask whether she could do that work?

[p. 137] A. Possibly. In the first place, if I didn't know what she was, I wouldn't be calling to find out. I'm not sure if I'm answering –

Q. I'm not sure if I understand your answer and I do want to understand it. Suppose you had this business card and that's all you had. And you wanted to engage her for either accounting or law services. Who would you determine whether or not she could handle the work you wanted to engage her for?

A. I would have to call the number on there and find out.

Q. What would you ask? I want you to assume something before you answer that question. I want you to assume, when you call that number, the person who answers the phone says "law offices." What is you first question to that person?

A. Is she a public accountant or is she an attorney?

Q. Okay. Suppose the person says she's an attorney; her practice is she's engaged in the law practice.

A: Then I would probably ask why does she have CPA on her business card.

Q. I want you to assume that you're still talking to the receptionist at this point, and the receptionist [p. 138]

tells you that it's true that she's a CPA. How do you use that information that when you learn that she is, indeed, a CPA but her practice is a law practice?

A. How would I use that information?

Q. Yes.

A. I'm really not sure, I mean –

Q. Would you still be confused about whether she was engaged in the practice of law or the practice of public accounting?

A. Well, looking at her business card, you would think she's doing both. Then once you find out that she is, yes, indeed, an attorney, I would say she's being an attorney and a certified public accountant based on her business card.

Q. This is after you've made the phone call?

A. Right.

Q. You would still believe she's engaged in both?

A. Yes.

Q. Let's say that the receptionist – I want you to assume you have some accounting work that you want done by a CPA.

A. Okay.

Q. And you set up an appointment with the receptionist for tomorrow, Wednesday, at 4 p.m., and they tell you where the offices are in Winter Haven, Florida; [p. 139] and you arrive, and the first thing you see when you get there is this sign. I want you to assume that is a photograph of the sign outside Mrs. Ibanez's offices.

A. Okay.

Q. Would you read what you see on the sign?

A. Law offices of Julae and Stuart, Attorneys, PA; Lawrence E. Stuart, Jr., Attorney at Law; Silvia S. Ibanez PA, Attorney at Law.

Q. When you see that sign, and you've set up an appointment to have some accounting work done by a CPA, does that make you nervous seeing that sign that maybe you picked the wrong person?

A. It would make me think I was at the wrong location.

Q. Would it make you think you were at a law office?

A. Seeing that sign, yes.

Q. I want you to next assume that you somehow missed the sign – that sign there.

THE HEARING OFFICER: Do these need to be marked for identification?

MR. SAMPSON: We have three photographs. I would like to mark them as Ibanez. Two photographs, one of the sign and the other one of the next –

THE HEARING OFFICER: Has Mrs. Pam seen these?

[p. 140] MRS. PAM: I saw one of them.

MR. SAMPSON: I think we left off on the numbering at the rule challenge at ten, unless you want to just start up with Ibanez.

THE HEARING OFFICER: We have Petitioner's 1 in this cause and these will be Respondent's.

MR. SAMPSON: Composite Exhibit 1 consisting of two photographs.

THE HEARING OFFICER: Now, you want these as Respondent's Exhibit 1-A and Respondent's Exhibit 1-B, is that right?

MR. SAMPSON: Yes.

THE HEARING OFFICER: Respondent's Exhibit 1-A is a photo of a large free-standing sign, Respondent's 1-B is a photo of a mounted sign.

(Whereupon, the documents referred to were marked as Respondent's Exhibit 1-A and Respondent's Exhibit 1-B for identification.)

BY MR. SAMPSON:

Q. I hand you what has been marked as Respondent's 1-B. The question I was going to ask you is: You have seen the first sign that's been marked 1-A, the large sign outside the office, and you see that and you begin to wonder now; you walk up the walkway, and the next thing you see is that smaller sign. What does that sign say?

[p. 141] A. Law offices.

Q. Do you see anywhere in the vicinity a reference to public accounting offices or certified public accountants?

A. No, not in the picture.

Q. At the time you see this sign, what is your belief about the nature of Mrs. Ibanez's practice?

A. Well, if you're just going by the signs, you would say law offices, she's an attorney, she's a lawyer.

Q. I want you to go by everything you've seen up to that point and everything you've heard when you made the initial contact on the phone. You've seen the business card, you made the phone call, you made the appointment and driven up now; you've seen the big sign, you walk up the walkway, and you see the smaller sign. What do you think now about Mrs. Ibanez's practice?

A. Well, going back to the business card, you would still say she's a certified public accountant and an attorney.

Q. You are employed by DPR, correct?

A. Correct.

Q. Have you had discussions with Mrs. Pam before today's hearing?

A. No. She asked me if I would be a witness.

Q. What did she provide you, if anything, in [p. 142] connection with your being a witness in this case?

A. She showed me a telephone ad – a phone book ad is all.

Q. What did she tell you about the case?

A. She told me nothing. She asked me if I knew what CPA stood for, and yes, I did: Certified Public Accountant. And then there were some other letters in

the ad, but I told her I didn't know what they were, and I still don't know what they are.

Q. Was the yellow page's ad under the attorney section, do you recall?

A. Yes, it was.

Q. You hadn't seen the business card before today?

A. No. I only talked to her just that one time.

Q. Did Mrs. Pam explain why she was selecting you to appear as a witness in the case?

A. No. Only as an uninformed person.

Q. Do you believe you're uninformed?

A. As far as knowing – yes.

Q. The letters CPA, what do they mean to you?

A. Certified Public Accountant.

Q. Is it valuable or beneficial for you to know that someone has gone through all the examination processes they need to go through to get the CPA license; does that have any benefit for you knowing that if you had [p. 143] to choose among different attorneys, one has a CPA license, the other doesn't, and you're coming to them for law work relating to some financial matter or something involving a lot of numbers? Is it helpful for you to know that they passed that CPA exam?

A. Probably not.

Q. What is that?

A. Well, if I'm going to them for legal services –

Q. Maybe I'm not making myself very clear here. Let's say there's a type of service that can be done by an accountant, CPA, who is not a lawyer; can be done by a lawyer who is not a CPA, can be done by a Certified Financial Planner who is neither a lawyer nor a CPA, or can be done by any combination of those credentials. Wouldn't you want a person with more credentials than fewer credentials to do the work that can be done by any of them alone?

A. Possibly.

Q. Besides Mrs. Pam approaching you for being a witness today, have you had discussions about the way your testimony might go today at the hearing?

A. No.

Q. Have you been coached at all on the answers to give?

A. No.

[p. 144] MR. SAMPSON: No other questions.

THE HEARING OFFICER: Redirect?

MRS. PAM: Nothing further.

THE HEARING OFFICER: May this witness be excused or do you want her to remain?

MRS. PAM: She may be excused.

MR. SAMPSON: I would like to introduce into evidence Respondent's Exhibits 1-A and 1-B.

THE HEARING OFFICER: Just a minute. Miss Rice. Do you wish to hold this witness for any reason?

MR. SAMPSON: No.

THE HEARING OFFICER: You are excused, Ms. Rice. But you will not discuss this case until you're informed by either Counsel, or myself, that it has concluded. Thank you for your attendance. Any objection to Respondent's Exhibit 1-A and 1-B, Mrs. Pam?

MRS. PAM: No.

THE HEARING OFFICER: Okay. They go in without objection. Your next witness, please ma'am.

(Whereupon, Respondent's Exhibit No. 1-A and 1-B were received into evidence.)

MRS. PAM: Martha Willis.

THE HEARING OFFICER: You've been sworn, Mrs. Willis. You may inquire Mrs. Pam.

[p. 145] WHEREUPON,

MARTHA P. WILLIS,

after having been previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MRS. PAM:

Q. Would you state your name for the record.

A. Martha P. Willis.

Q. And your place of employment.

A. Department of Professional Regulation, Florida Board of Accountancy.

Q. How long have you been in that position?

A. Nine years.

Q. I show you Petitioner's Exhibit 2, and ask you if you recognize these?

THE HEARING OFFICER: Petitioner's 2 for identification. What may I call this, Mrs. Pam?

(Whereupon, the document referred to were marked for identification as Petitioner's Exhibit 2.)

MRS. PAM: It's a composite exhibit made up of a number of different letters to the Board.

THE HEARING OFFICER: Composite informal opinions.

MR. SAMPSON: We haven't seen them. They are not on the exhibit list. We are making a motion for [p. 146] official recognition. We would like a little time to look at it.

THE HEARING OFFICER: Very well. Let's let the respondent look at them before you inquire further. Do I understand the representation of everybody that these are different than the others, than those that you've agreed to?

MRS. PAM: It was my understanding that these were listed as exhibits.

THE HEARING OFFICER: Sometimes these pre-hearing listings get a little vague. If you would tender these to respondent and let Counsel look at them.

MRS. IBANEZ: Okay. If I may speak to that issue. It has a generic category, and we had requested

opinions regarding the CFP. And, so, we have them under public records at request, but we don't have all of these. Some are new to us. We didn't get some of these. If we may have one minute that would be fine.

THE HEARING OFFICER: You're free to object. I just want you to have an opportunity to look at them.

MRS. IBANEZ: That opportunity will be sufficient, Madam Hearing Officer.

THE HEARING OFFICER: Has the respondent had [p. 147] enough time to look at these?

MR. SAMPSON: No objection to their being officially recognized, if that's what the motion was.

THE HEARING OFFICER: Well, I don't think we are at that stage yet. I think the question is: Does Mrs. Willis recognize them, and she has answered yes, she does. Mrs. Pam, you may proceed.

BY MRS. PAM:

Q. Can you tell us what they are, please?

A. They're all informal opinions which were ratified by the Board of Accountancy.

Q. On any particular subject?

A. Yes, dealing with the specialization designations.

Q. Has the Board opined on the Certified Financial Planner designation?

A. Yes, it has.

Q. And what is their opinion?

A. That it is a specialty designation.

Q. Has the Board approved the use of this specialty designation?

A. No, they have not.

Q. Has this been their ruling within the past ten years?

A. Well, since I've been there – the nine years [p. 148] that I have been there. These opinions start in 1982 and have been consistent since that time.

Q. Is that still their opinion today?

A. Yes.

Q. Do you know why they have opined that CFP designation as a specialty?

A. No, I don't.

MRS. PAM: At this time I'd like to move Petitioner's Exhibit 2 into evidence.

MR. SAMPSON: No objection.

THE HEARING OFFICER: If it is a composite, let's be sure it is all together. This one is, and is admitted without objection.

(Whereupon, Petitioner's Exhibit No. 2 were received into evidence.)

THE HEARING OFFICER: You tender the witness, Mrs. Pam?

MRS. PAM: Yes.

THE HEARING OFFICER: Cross?

MR. SAMPSON: Just for the record, for this composite, so we know we have everything, – it's not a stapled thing – can we just go through by the date and the name maybe of the person who is inquiring.

THE HEARING OFFICER: Why don't you simply compare your copy with Petitioner's 2, and if there [p. 149] is any question or any problem, feel free to object.

MRS. IBANEZ: There is about 20 loose sheets, Madam Hearing Officer, there's really only six licensees. Some of them can be clipped. Our request is just to name Nichols, – the last name – and to say Nichols. Just list the six names and the six opinions for clarification.

THE HEARING OFFICER: Well, I'm certain we could do it that way, but if they are stapled together and the copy that's being admitted, won't that cover it?

MRS. IBANEZ: Well, if it doesn't come apart, it will cover it, yes, I agree. It's just a thought.

THE HEARING OFFICER: For further clarification, Petitioner's 2 constitutes 16 pages related to six opinions. Is that the parties' representation?

MRS. PAM: Yes.

THE HEARING OFFICER: Very well.

CROSS EXAMINATION

BY MR. SAMPSON:

Q. Mrs. Willis, I'm Michael Sampson, we met before, I have a couple of questions, or more. Since the

years you've been Executive Director at the Board of Accountancy, you've had to answer many questions in writing for licensees, correct?

A. Yes.

[p. 150] Q. Whenever you answered in writing, you were giving an informal opinion on the matter they were inquiring about.

A. Correct.

Q. It wasn't a legal opinion you were giving them.

A. No.

Q. What kind of opinion would you say that was?

A. It's an informal opinion, which is then given to the Board at their next meeting for them to either ratify or modify. And, so, the opinion very clearly states that it's not binding on the Board until such time as they have read it and taken action on it.

Q. In your informal opinions, including the ones that you've looked at as Petitioner's Composite 2, would you cite certain rules that you felt applied in the particular matter that they inquired about?

A. Would I cite them?

Q. Yes, in the informal opinion you give, would you cite provisions of the statutes or certain rules that you felt applied?

A. Usually I do, yes.

Q. Did you ever tell a CPA licensee in writing that you're not an attorney; and, therefore, could not render any legal opinion to them?

A. No, I don't believe I've done that.

[p. 151] Q. On all the various opinions pertaining to CFP and CPA, using the CPA designation, that we call the holding out of CPA – in all those various opinions how many – and you can give it by percentage if it's easier – how many would you way were ratified, word for word, by the Board of Accountancy?

A. Well, it's just a guess, but probably – just specifically with related to CFP and CPA?

Q. Yes.

A. Somewhere around 95 percent, probably.

Q. In the vast majority of cases they ratified the opinion you've given, correct?

A. Well, I think if it's not specifically on this issue, it might be a little bit lower than that.

Q. No, just on this issue.

A. On that issue, in the vast majority, that's correct. They would ratify it.

Q. Are you aware of any complaint against Mrs. Ibanez by any member of the public for having used the CFP credential in her advertising?

A. Well, I'm aware, of course, of the case we're talking about today. I don't know who filed the complaint in that case.

Q. Was there a complaint filed in the case?

A. I don't know. I'm not the complaints analyst.

[p. 152] Q. Have you seen a complaint filed in the Ibanez matter –

A. No.

Q. – with regard to the CFP designation?

A. No.

Q. Have you ever seen any complaint against any person who uses the CFP credential in advertising?

A. I believe so.

Q. Was that from a member of the public – "the uninformed public" as we've called them?

A. I receive complaints in the mail anonymously. I assume they're from the public when they just come in the mail and there's an advertisement or something with a circle around it. I don't know if it's from a member of the profession or the public or where. I do receive complaints that way.

Q. You have no idea whether that's from a member of the public?

A. Presumably, it is.

Q. Why would you presume it is, or isn't?

A. Who else would it be from?

Q. For example, CPA.

A. They're a member of the professions, they're also a member of the public.

Q. Let's talk about the people who aren't CPA's,

[p. 153] who are in competition with CFP's for certain markets for types of services that are handled by both CPA's and CFP's; have you received or seen any complaints from those who are not CPA's pertaining to the use of the CFP or CPA credential?

A. I really can't recall receiving a complaint from a member of the public that was not a CPA other than anonymous complaints. I have no idea who they came from.

Q. Thank you. Have you, yourself, conducted any study of the public's impression or interpretation of the letter CFP?

A. No, I have not.

Q. What is it that leads you to believe the public infers that the letter CFP implies a specialty?

A. I don't believe I said that I've been lead to believe that.

Q. Was that the Board of Accountancy that lead you to believe that?

A. No. I don't know that anybody lead me to believe that.

Q. Is the first opinion pertaining to the CFP designation the top of the pile there?

A. Mr. Pierson?

Q. Let's look at Exhibit 2 for petitioner. Mr. Carl Pierson.

[p. 154] A. Right.

Q. You recall that being the first time you opined or the board of Accountancy opined about the use of CFP designation?

A. No. These opinions began when I started work for the Board. I'm sure that there were opinions prior to 1982 issued by other executive directors. Whether or not they cover that specific item, I don't know, so I can't say that it's the first time. This is just the opinions since 1982, since I started to work there.

Q. At the time that you signed this July 8th, '82 letter to Mr. Pierson –

A. Uh-huh.

Q. – had any study been done to your knowledge about how the public views the letter CFP?

A. Not to my knowledge.

Q. And what that means to the public?

A. No.

Q. What those letters imply to the public?

A. No.

Q. I'm going to ask this in a different way, but let me ask. Do you know of no actual or perspective client of Mrs. Ibanez who has filed a complaint against her for using CPA or CFP?

A. No, I don't know that.

[p. 155] Q. Do you know how the CFP designation came to be viewed by the Board of Accountancy or yourself as a designation of the specialty of public accounting?

A. No, I don't know how.

Q. Is it true that Mrs. Ibanez is a CFP?

A. I don't know that.

Q. Do you know whether that her using CFP misleads anybody?

A. I don't know.

Q. I don't know if this is in your packet or not, it's another opinion I want you to refer to. We'll just have this marked separately for identification as Respondent's Exhibit 2. And it has been officially recognized, I understand, by the FICPA as motion from the other case.

THE HEARING OFFICER: Respondent's 2, A 12/9/87 response and 11/30/87 inquiry – McGruther. Good enough, Mr. Sampson?

MR. SAMPSON: Yes.

(Whereupon, the documents referred to were marked as Respondent's Exhibit 2 for identification.)

BY MR. SAMPSON:

Q. I hand you now what has been marked as Respondent's Exhibit 2, and ask whether you can identify that informal opinion that's been ratified?

[p. 156] A. Yes.

Q. That pertains to the use of the CFP designation, does it not?

A. Yes, it does.

Q. To your knowledge, is that included in the Petitioner's Exhibit 2?

A. No, it is not.

Q. Mrs. Willis, was an inquiry, apparently by Ms. Judith McGruther, about whether she could hang her CFP diploma in her office, do you recall your opinion?

A. Yes. My opinion was that she could do that.

Q. She also inquired whether she could use the CFP description on her resume when she was stating her biographical information pertaining to her education. Do you recall whether you opined on whether she could use that CFP?

A. Yes, I do.

Q. And what was that opinion?

A. That she could.

Q. That opinion was ratified, correct, by the Board of Accountancy on January 26th, '88?

A. Yes.

MR. SAMPSON: No other questions. I move to submit that into evidence at this time.

THE HEARING OFFICER: Any objection?

[p. 157] MRS. PAM: No.

THE HEARING OFFICER: Very well. Respondent's 2 is admitted. Folks, I may be wrong but I make it seven opinions in Petitioner's 2.

MR. SAMPSON: Yes there are seven.

(Whereupon, Respondent's Exhibit No. 2 were received into evidence.)

THE HEARING OFFICER: Very well. I'm going to edit the docket sheet that way. Redirect, Mrs. Pam?

MRS. PAM: I don't have a copy of it.

THE HEARING OFFICER: Yes, ma'am. All the exhibits are here.

REDIRECT EXAMINATION

BY MRS. PAM:

Q. In looking at this letter, does it not also state that she cannot use the CPA designation in conjunction with the CFP designation?

A. Yes, it does.

Q. And what is the reason for that?

A. Because it's a specialty designation and the rules prohibit it.

MRS. PAM: Nothing further.

THE HEARING OFFICER: We ll let Mrs. Willis get more comfortable in the same seat. Next witness.

MRS. PAM: Nothing further. The petitioner [p. 158] rests.

THE HEARING OFFICER: Before you do that, Mrs. Pam, you folks have listed a number of exhibits by agreement but they haven't been moved in. Is it your intent not to do that or are you assuming just because they've been stipulated that there's no objection – they go in automatically? I'm advising you they do not.

MR. SAMPSON: Respondent doesn't assume that they do go in.

MRS. PAM: I'm sorry.

THE HEARING OFFICER: I give you just a minute to think about that, Mrs. Pam. I'm not trying to run your case, but I note that the pre-hearing stip that I got this morning is just slightly different than the one I got last week. So, I just want to be sure you all are on the same wavelength.

MRS. PAM: The only other exhibit that I would have is Petitioner's Exhibit 3, which is a Certificate of License.

THE HEARING OFFICER: Any objection to that?

MR. SAMPSON: No objection.

THE HEARING OFFICER: Very well. Certified copy of license information goes in without objection as Petitioner's 3. That being the case, does Petitioner [p. 159] rest?

(Whereupon, the documents referred to were marked as Petitioner's 3 and received into evidence.)

MRS. PAM: Yes.

THE HEARING OFFICER: Very Well. Respondent.

MR. SAMPSON: Could we take a five minute break?

THE HEARING OFFICER: Sounds good to me. How about 15 minutes. Folks, I think you've been through this one drill; I leave the exhibit list and all the exhibits in one location so you all have access to them.

(Whereupon, a short recess was had.)

THE HEARING OFFICER: Let us be in order. Respondent.

MR. SAMPSON: Respondent at this time moves for a directed verdict. There's been no evidence at all, let alone clear and convincing evidence, that Mrs. Ibanez is in violation of any of the rules or statutes alleged in the amended administrative complaint.

We've heard a little bit of testimony about a business card, coupled with the facts that have been stipulated into evidence. Nothing from all of that amounts to and alleges the elements that they need to prove, in order to establish by clear and convincing [p. 160] evidence, the violations that they've alleged in the amended administrative complaint.

There was Ms. Rice, and her testimony. She is primarily a bellwether of the great uniformed [sic] public out there. She is an employee of the DPR. Even she indicated that it was possible – the use of CPA – that information would be valuable to her. "It was possible," she said.

She indicated that if she went through the chain of events that most people would go through, after she saw the business card, made the phone call, went up the walkway and saw the signs, she would begin to realize that Mrs. Ibanez was a practicing lawyer and not a practicing public accountant.

The whole case boils down to the use of CFP and CPA in advertising, and whether or not that advertising is misleading to anybody. There is no evidence of anybody having been misled, in fact, or that would have

been misled or could be misled. The only evidence is Ms. Rice's testimony and that, we contend is woefully inadequate. We at this time move for a directed verdict.

THE HEARING OFFICER: Response, Mrs. Pam?

MRS. PAM: I have to agree that the whole case boils down to the use of the CPA, CFP designations. [p. 161] But there are opinions in evidence from the Board that have opined, specifically, on the subject that it is a violation of the advertising rule.

The advertising rule, specifically, says that if you use it that is in and of itself misleading and deceptive.

THE HEARING OFFICER: That's your argument?

MRS. PAM: Yes.

THE HEARING OFFICER: The very fact that there is a pending rule challenge would lead me to believe that this motion for directed verdict, which I assume is really a motion for summary of recommended order and I will take it in that light, could not appropriately be granted at this time. But, even if it could, under our rules, the very fact that I have to enter a recommended order would mean that it is necessary for me to do that in the form of a recommended order.

Consequently, I will deny it at this time for revisitation in the course of the recommended order. I will preserve that you within the recommended order, and if you choose not to put on a case at this time, I will understand that; however, I will recommend that you proceed.

MR. SAMPSON: We will proceed. Thank you. We [p. 162] call as our first witness. Mr. Robert Goss.

THE HEARING OFFICER: Let me suggest something else to you folks. It's about four minutes before the lunch hour – would it be convenience or would anybody be prejudiced by resuming at one o'clock? Or if you have any reason to proceed at this time, I'll certainly go right ahead at this time. I don't want anybody to do without lunch, and I recognize we have some health problems here.

MR. SAMPSON: That's fine.

THE HEARING OFFICER: All right. We'll resume at one o'clock.

(Whereupon, a lunch recess was had at 12:00 p.m. and the proceedings resumed at 1:05 p.m.)

THE HEARING OFFICER: Let's be in order. We are ready for respondent's case in chief. Mr. Sampson.

MR. SAMPSON: Respondent calls Robert Goss.

THE HEARING OFFICER: Have a seat right here, Mr. Goss. Mr. Goss has been previously sworn. You may inquire.

MR. SAMPSON: Thank you.

WHEREUPON,

ROBERT GOSS,

after having been previously sworn, was examined and testified as follows:

[p. 163] DIRECT EXAMINATION

BY MR. SAMPSON:

Q. Mr. Goss, I'm Michael Sampson representing Silvia Ibanez in this matter. What is your full name?

A. Robert P. Goss, Jr.

Q. Mr. Goss, with whom are you currently employed.

A. I'm currently Executive Director for the International Board of Standards and Practices for Certified Financial Planner, Inc. It's such a long name, we call it the IBCFP.

Q. I will refer to it as the IBCFP for convenience. Tell me what the IBCFP, does and what you do within the IBCFP.

A. Well, I'm the chief staff officer for the corporation. We are an international certification, standard setting, licensing and displinary [sic] body for those people who either seek to have or to hold the marks Certified Financial Planner, and CFP.

Q. Are those two different things; Certified Financial Planner and CFP, or is CFP merely an abbreviation of Certified Financial Planner?

A. They are two different marks. The CFP does mean Certified Financial Planner, but we had to register them separately.

Q. Are those both registered trademarks?

[p. 164] A. They are registered marks, yes. They also have common law protection.

Q. Are those exclusively within the IBCFP's jurisdiction to control?

A. Yes, sir. We own the marks, and we have an obligation to protect them as a result of that ownership.

Q. When were these marks first originated? When was the first time the CFP or Certified Financial Planner mark came into being?

A. We received the marks from the College for Financial Planning in 1986. We, as an organization, were formed in 1985. The college first granted that mark to individuals in 1973. The registration occured [sic] shortly thereafter in 1973, '74, '75 period: somewhere thereabouts.

Q. Would you give me some information about your membership? How may CFP's and Certified Financial Planners are there in the United States today?

A. Counselor, we are not a membership organization. There is a professional membership association called the Institute of Certified Financial Planners, which is the professional membership for those people who hold that mark, much like the American Bar Association is to the professional associations for licensing attorneys and so forth, but we are not a membership organization.

We have licensees; we license individuals on an [p. 165] annual basis to use the mark and we have an annual registration process. We currently have in 1991, little more than 22,000 individuals within the United States using that mark.

Q. Do you have any knowledge of how many of those CFP's who are using the mark CFP or Certified Financial Planner – how many of those are CPA's?

A. Yes we do. Of the – there are just a little more than 3,400 who have indicated on their annual registration form to us that they are also certified public accountants in one or more states.

Q. Are CFP's and Certified Financial Planners regulated by a code of ethics?

A. Yes. We have a Code of Ethics and Standards of Practice. It's a combination that was instituted in 1986 with our getting the mark from the college, and that's been in place since that time; but yes, there is.

Q. I'd like to hand you what will be marked for identification as Respondent's exhibit 3.

THE HEARING OFFICER: Respondent's 3. What do you call this?

MR. SAMPSON: IBCFP Code of Ethics and Standards.

THE HEARING OFFICER: Very well. For identification Respondent's 3, IBCFP Code of Ethics [p. 166] and Standards.

(Whereupon, the documents referred to were marked as Respondent's Exhibit 3 for identification.)

MR. SAMPSON: Before I show it to you, I'd like to hand it to Mrs. Pam.

BY MR. SAMPSON:

Q. Mr. Goss, please take a look at what's been marked as Respondent's Exhibit 3. Can you identify that document?

A. Yes. It is the recent edition of our publication by this very name.

Q. Does that publication accurately set forth the Code of Ethics you were referring to?

A. It's current as of today, that's correct.

Q. Are there any ethical provisions regarding the use of the CFP mark?

A. Yes, there is. In code VI B2 there's a provision on the use of the CFP mark with or without other degrees in professional designations and marks. It indicates –

Q. Go ahead and read that, if you would. I'm sorry for interrupting you.

A. It indicates in 2 A that all applicable guidelines and regulations by us regarding use of the marks CFP and Certified Financial shall be strictly [p. 167] followed by our licensees. And then B, indicating the use of the designations.

It indicates that the CFP designees who has attained a CLU – that's Chartered Life Underwriter – CPA, JD or MBA degree or other designations, may list them after the CFP designee's name in order of personal preference in advertising, letterhead stationery and business cards. Then it goes on to say the Investment Advisers Act of 1940 requires registration of investment advisers with the Securities and Exchange Commission.

The CFP designees may disclose their status as registered investment advisers to clients. Under present standards of acceptable business conduct, it is proper to use Registered Investment Adviser if the CFP designee is registered individually; however, RIA or R.I.A. following a CFP designee's name in advertising, letterhead stationery and business cards may be misleading and is not permitted, so we do not permit that one. Others we do permit at the discretion of the licensee.

Q. Does the CFP credential state, or imply, that the CFP has received formal recognition in any aspect of the practice of public accountants?

A. No sir.

Q. What is the basis for your statement that it does not?

[p. 168] A. The designation indicates that somebody has met requirements in terms of education, in terms of examination, in terms of experience and in terms of ethics. And, if they are a continuing licensee, whether if they met post-certification requirements with one or more of those items as well, it does not have a relationship to public accountancy.

We test, Counselor, on the basis of a job analysis, which has been performed some years ago in 1987 for what constitutes the work of a Certified Financial Planner and financial planning in general. And, as a result of that rather technical exercise, we have put into place an examination process which tests for that content to mean – or body of knowledge as they call it – and we use a whole

series of academics and other practitioners to continue to keep that examination and other things in place.

It's a broad based examination in the areas of Fundamentals for Financial Planning, Risk Management, Investment Planning, Tax Planning, Estate Planning, and Fringe Benefit and Retirement Planning.

Q. Must you be a CPA in order to be a CFP?

A. No, sir. In fact, the field of financial planning as we know it today, did not evolve out of accountancy. But rather, for better or for worse, evolved [p. 169] out of the insurance – and to a lesser extent – to the security's field late in 1960's and during the early '70s.

It was really developed from the position of agents and others not wishing to be in the position of having to sell a product, but to try to serve the interests and needs of the clients or customers or people that they work with. And yet the strictures at the time in place almost require that they do so. And, so this whole movement was begun.

It was a society for financial counseling, formed in 1969 and since that time has evolved into what we have today for financial planning.

Q. Now, all kinds of different people can do financial planning, is that correct?

A. Well, that's right.

Q. You have APFS – I'm going to read out some letters and tell me whether these people, first of all, what the letters mean; and, second, whether they do financial planning. APFS, does that have any meaning to you?

A. Yes, It's Accredited Personal Financial Specialist. It's a designation offered through the American Institute of Certified Public Accountants. It's a designation that's relatively recent – over the last several years – and it indicates that somebody may be a [p. 170] specialist in sofaras [sic] they've met the requirements for that body in terms of public accountancy or public accounting or that area.

Q. So, the public accountants have their own designation for certified – excuse me – for financial planners?

A. They have recently developed that for CPA's and it's a voluntary process.

Q. What do the letters CEA mean to you?

A. CEA?

Q. If any.

A. That doesn't ring a bell with me, I'm sorry.

Q. What about CHFC?

A. Yes, Chartered Financial Consultant. It's a proprietary credential offered by the American College out of Bryn Mawr, Pennsylvania. They've been in existence for many, many, many years. They're backed by the insurance industry, and that credential began well after our own as well, in and about 1983 period of time.

At first it meant that somebody had to take another three courses beyond the Chartered Life Underwriters – CLU credential – from that same institution. Today, at the current time, people can pursue that designation separately – do not have to first go to Chartered Life Underwriter.

[p. 171] It is roughly equivalent to the educational component that we require for people to become Certified Financial Planner, licensed with us, but it doesn't have the market penetration and a lot of things as the CFP – Certified Financial Planner has. It's a good quality educational program, however, it does have a tinge of life insurance expectations on it.

Q. The next one is CLU.

A. Chartered Life Underwriter, it's been in existence for many, many decades. Again, offered solely by the American College out of Bryn Mawr, Pennsylvania.

Q. They can do financial planning at CLU?

A. Well, there are not a lot of law or regulation directed to financial planning as a body. And so people can call themselves financial planners without having to register as such. I suspect that will change in the years ahead, but currently that is the case.

There are a number of organizations that have taken a formal stance on that of some governmental nature. One is the SCC itself, which indicates that somebody cannot hold out as a financial planner to the public without registering as a Registered Investment Advisor under the 1940 Investment Advisors Act.

Similarly, NASA – North American Securities Administrators Association has taken a similar position. [p. 172] In fact, released 10-92's and joint release for both of those organizations. The other organization that has taken a position on this is the National Association of Insurance Commissioners, which has developed model

legislation, Counselor, which would prohibit an insurance agent from using the term "financial planner", when, in fact, all they do is sell insurance products.

To do any of those things is misleading to the public, and that's why those are the bodies that have taken that position. Somebody could do financial planning as a CLU but it may be misleading. They, basically, are professional life insurance agents.

Q. Is the ability to use the letter CFP valuable to the person who uses those letters truthfully?

A. Yes. In fact, that's why people voluntarily pursue the certification process with us. I've indicated how many are currently licensed, and we have more than 20,000 students engaged in financial planning courses from anyone of over 40 institutions of higher learning. Either in graduate programs, under-graduate programs or certificate programs.

We have among other things, we register the curricula of institutions of higher learning around the country, including the University of California, Alabama, South Carolina University and many others. So that [p. 173] students going through those programs can sit for our examination and become certified from us. So, obviously, they also believe that it's valuable to the public.

Q. You refer to the public, I have asked you about the value of using the CFP letters to the person who uses them. Now, let me ask you, the next step is, is there any value, in your opinion, to the public in seeing those letters; is there any information conveyed to the public?

A. I think it's a high value to the public. We get hundreds of phone calls every week from the public about these kinds of issues. And our whole intent and mission, since we are not a membership association, is to provide a level of assurance to the public about the qualifications of individuals who opt to provide financial planning services.

And, so, the marks have that meaning to those individuals who hold the marks, as well as to the public who seek out somebody who has some specific training background and experience, and certain kinds of ethical canons to follow in the practice of financial planning.

Q. According to the records of the IBCFP, is Mrs. Ibanez an active, currently certified CFP?

A. Mrs. Ibanez, was authorized by us in 1988 to use the marks. She was licensed with us in 1990 and she is currently licensed with us in 1991.

[p. 174] Q. Has the IBCFP ever entered into any arrangement with the Florida Board of Accountancy with regard to the CFP mark?

A. No, sir, we've not.

Q. Has there ever been any assignment, informally or formally, of any portion of the mark to any state?

A. No, sir, there has not been.

Q. Has there been any delegation or assignment of the mark CFP to the Florida Bar or the Florida Supreme Court?

A. No, there has not been.

Q. Do you believe the Board of Accountancy has a right to control who can and can't use the CFP credential in the state of Florida?

A. In order to protect the marks, we are obligated legally to enforce their use. This means that we have to go after individuals who have misused the mark, licensees who many not use it properly, individuals who may use it but not have the right to use it, or other organizations or entities that would put upon it a meaning it does not have. The meaning placed upon it as a subdivision of public accounting is clearly erroneous.

MR. SAMPSON: No other questions.

THE HEARING OFFICER: Cross? –

MRS. PAM: I just have two questions for you.

[p. 175] CROSS EXAMINATION
BY MRS. PAM:

Q. Is there anything in your code that restricts the use of the CFP designation?

A. Yes.

Q. Can you tell me what that is?

A. It's restricted only to those individuals who are licensed by us to use it on an annual basis, Counselor. And the code provision regarding that is in Code 1 B1. It inidicates [sic] that all professional activities of the CFP designee shall be in accordance with applicable rules, regulations and other established practices of the IBCFP.

Q. If a state regulatory body has determined that the use of the CFP designation is in violation of their

rules, is there anything in that code of ethics that would override that?

A. Not that I know of, unless we feel that they're using the mark inappropriately, in which case we would have to enter it into a minimum discussion with them and perhaps litigation, but not unless that test is met first.

MRS. PAM: I have no further questions.

MR. SAMPSON: Just one on redirect, if I may.

REDIRECT EXAMINATION

BY MR. SAMPSON:

[p. 176] Q. You were asked about your code, let me hand you what I want to mark as Respondent's Exhibit 4 for identification.

THE HEARING OFFICER: Respondent's 4 - IBCFP General Information Booklet?

MR. SAMPSON: Yes.

(Whereupon, the documents referred were marked as Respondent's Exhibit 4 for identification.)

BY MR. SAMPSON:

Q. Mr. Goss, I'd like to hand you what has been marked as Respondent's Exhibit 4 for identification. Can you identify that booklet?

A. This is the General Information Booklet that we publish on a yearly basis. This is the most recent edition, published in early July, I believe.

Q. Does that accurately set forth the educational examination, experience and ethical requirements that apply to CFP and Certified Financial Planner?

A. Yes, it does. It's the booklet in general that we send to all individuals who inquire upon what is necessary to become certified with us, and other interested members of the public to which we send this.

MR. SAMPSON: I'd like to introduce Respondent's Exhibit 4 into evidence.

THE HEARING OFFICER: And 3?

[p. 177] MR. SAMPSON: And 3.

THE HEARING OFFICER: No objection and they are admitted.

(Whereupon, Respondent's Exhibit No. 3 and 4 were received into evidence.)

MR. SAMPSON: Nothing else.

THE HEARING OFFICER: Mr. Goss, for purposes of clarification, I'm entitled to ask certain questions under the evidence code. Don't answer anything except what I ask, then I'll give each counsel an opportunity to inquire.

BY THE HEARING OFFICER:

Q. Do I understand that IBCFP is incorporated?

A. Yes, it is.

Q. What state are you incorporated?

A. Colorado. We are a 501C3 organization in Colorado.

Q. And you have no ties or affiliations within the state of Florida, is that correct?

A. We have licensees within the state of Florida.

Q. You have no governmental affiliations with any licensing organization within the state of Florida?

A. That is correct.

THE HEARING OFFICER: Questions on the basis of my questions for clarification only, Mrs. Pam?

[p. 178] MRS. PAM: No.

THE HEARING OFFICER: Mr. Sampson?

FURTHER REDIRECT EXAMINATION

MR. SAMPSON:

Q. On the mark itself, explain how that was registered and with what body that was registered?

A. With the Patent and Trademark Office in Washington, D.C. Actually, I guess it's in Alexandria, Virginia.

Q. That is the United States Patent Office?

A. Yes. And, of course, there is common law protection, as I indicated earlier to a question, in English-speaking countries, including both protection under common law and registration statutes.

MR. SAMPSON: Thank you, Mr. Goss.

THE HEARING OFFICER: What do you want to do with this witness?

MR. SAMPSON: He may be excused.

THE HEARING OFFICER: Any reason to hold him, Mrs. Pam?

MRS. PAM: No.

THE HEARING OFFICER: Okay. Mr. Goss, we appreciate your attendance.

MR. SAMPSON: Next witness is Silvia Ibanez.

THE HEARING OFFICER: Mrs. Ibanez – any reason [p. 179] she can't testify from there?

MR. SAMPSON: No.

THE HEARING OFFICER: She has all her materials in front of her. Mrs. Ibanez was previously sworn, and she remains under oath.

WHEREUPON,

SILVIA IBANEZ

after having been previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SAMPSON:

Q. Mrs. Ibanez, I understand from your testimony in the rule challenge, that you believe you are not engaged in the practice of public accounting, is that correct?

A. Correct.

Q. Why do you say that you're not engaged in the practice of public accounting?

A. Because I only have one practice, and that is the practice of law.

Q. Do you believe that the activities you perform in your law practice are at issue in these proceedings in the disciplinary case?

A. No. I believe it's just an advertising issue. They don't want me to use the CPA or the CFP credential in my advertising.

[p. 180] Q. You are aware of the Holding Out Rule, 21A-20.012 that the DPR's alleged you violated in the amended administrative complaint?

A. Yes.

Q. Are you holding out as described in the rule?

A. I believe that the rule is a definition – attempts to be a definition – it's a bit confusing, but if it's a definition, I don't see how I can be in violation of the definition. I either am or I'm not a CPA.

So, if your [sic] asking me am I holding out as a CPA – for identification purposes, yes, I identify to the world I am a CPA. Holding out in the context of what is the representation of my firm; clearly, representation to the public and the world is that I'm a law firm, not a public accounting firm.

Q. I would like to see Respondent's Exhibit's 1 A and B. Mrs. Ibanez, I will hand you what has been previously marked for identification and introduced into evidence as R-1A and R-1B, Respondent's Exhibit 1 are two photographs. Do you recognize those photographs?

A. Yes.

Q. Did you take those photographs?

A. Yes, I did.

Q. What do those photographs depict?

[p. 181] A. That one is the front of the building where I have my law offices, and the other is a stand-up sign on the front lawn, which is also on the corner. We are on an intersection, and it's on the corner of the lawn in front of the building – the law office building.

Q. When were those photographs taken?

A. In the last 60 days. I don't remember the day precisely when.

Q. When were the signs put up that are depicted in the photographs?

A. I've been in that building since early last year. Prior to that, I was in another law building in Lakeland. I transferred my – geographically from Lakeland to here.

Q. Are there any signs outside or even inside your office that state that you're a Certified Public Accounting firm?

A There is no signs.

Q. Or indication of CPA on the signs as you walk into the office?

A. No, CPA is not on any of the signs, nor public accounting firm, anywhere.

Q. Well, if you believe you're not practicing public accounting, do you also believe the DPR has any jurisdiction over you in this matter?

[p. 182] A. I believe they don't, because from, you know, every four years we have to take the law and the

rules exam. So, it's drummed into us. Even if we didn't want to keep up to date with the law and the rules, we have to. It's so clear in the law, in the preamble to Chapter 473, that all those provisions are there to regulate the practice of public accounting. And I'm not practicing public accounting. I'm practicing law.

So, why should they try to use those standards or that rule to measure my activities in the practice of law? I don't see it.

Q. To your knowledge, are you in compliance then with the Florida law regarding the use of the CPA credential, or do you contend that the law doesn't apply to you?

A. No. I believe Chapter 473 has several provisions that apply to those of us that are CPA licensees. In other words, there's provisions in Chapter 473, and I would contend those apply to anybody that has an active license as a CPA, which I am one of them.

And those provisions - I don't remember the citations, but it doesn't really matter - there's at least two of them that make reference to who can and who cannot use the CPA credential. And I am in compliance with Florida law regarding that. I'm in full compliance [p. 183] with that, I believe.

Q. Have you maintained your continuing education that you need to maintain to keep your status active?

A. Yes, sir. That's one of the requirements.

Q. Are there any other requirements you're familiar with?

A. You have to take a law and rules exam every few years, and pass that.

Q. Have you done that?

A. Yes, I have.

Q. Have you passed each time you've taken it?

A. Yes, I have.

Q. I would like to hand you, this time, what has been identified in the stipulation on the exhibit list as a CFP Certificate that the IBCFP issued. We have a copy of the certificate, and I want you to confirm that that is a true and correct copy. We'll have that marked for identification as Respondent's Exhibit 5.

THE HEARING OFFICER: Respondent's 5.

MR. SAMPSON: The CFP Certificate.

THE HEARING OFFICER: CFP Certificate of respondent.

(Whereupon, the documents referred to were marked as Respondent's Exhibit No. 5 for identification.)

BY MR. SAMPSON:

[p. 184] Q. Mrs. Ibanez, is that an accurate copy of the original certificate?

A. Yes. That is a copy of the one that hangs on my wall.

Q. Is that in your office somewhere?

A. Yes, it's in my office together with all the other certificates and diplomas.

Q. What are those other diplomas that are hanging up there?

A. I have my State of Florida CPA License Certificate hanging on the wall. I have my Supreme Court of Florida, when I was admitted to practice, and then with the Florida Bar by virtue thereof. Certificates or diplomas regarding my membership with several professional associations.

I'm a member of the American Bar Association, Florida Bar Association; that's, the Supreme Court Certificate, I'm a member of the FICPA, for that we really have a card, on the FICPA we have like a small reduction of what that is. I carry that with me but I don't know if I have it with me today. Also a member of the AICPA – the American Institutes of CPA's. I'm also a member of the ICFP, and the ICFP is the voluntary membership association for those of use that are CFP's.

Q. Is that the professional organization?

[p. 185] A. That's a professional membership organization for CFP's, which is different from the IBCFP, which was Mr. Goss. I have a certificate from them. Then I have various other awards and things like that hanging from the wall.

Q. Are you aware of any prohibition under Florida law that prohibits your use of the CFP credential?

A. No, not even the one that's in the complaint. The complaint talks about misleading or fraudulent or deceiptful [sic], or whatever advertising; and it's true, I do have the CFP credential.

Q. Do you know of any of your own clients who have every [sic] been misled by your using CFP credential?

A. Not at all.

Q. In your advertising?

A. Not at all, to my knowledge.

MR. SAMPSON: I'd like to mark for identification Respondent's Exhibit 6, a copy of the Registered Investment Advisor License. We have the original. I would like to substitue [sic] a copy, if there is no objection. Let me first have it marked – a copy of it.

THE HEARING OFFICER: Registered Investment License.

MR. SAMPSON: Yes.

[p. 186] MRS. IBANEZ: Or just Investment Advisor, we call it the RIA registration.

THE HEARING OFFICER: Registered Investment Advisor License will be Respondent's 6. Any problem with copies Mrs. Pam?

MRS. PAM: No.

(Whereupon, the documents referred to were marked as Respondent's Exhibit No. 6 for identification.)

BY MR. SAMPSON:

Q. Can you identify what's been marked as Respondent's Exhibit 6?

A. Yes.

Q. What is that?

A. It's a copy of the State of Florida's Division of Securities and Investments' License that's issued to Registered Investment Advisors under Chapter 517, Florida Statutes. It's the one that's currently in effect. They issue one every year based on an annual form and disclosure and some other requirements.

Q. Are you required to disclose that you're an RIA in any content?

A. I am required to disclose, as an RIA, all my background and credentials and licenses, et cetera, to members of the pulic [sic], particularly those members of the public that seek out financial planning services.

[p. 187] Q. Do those requirements include your disclosing to the public that you're a CFP and, or CPA?

A. I'm sorry. Could you say that again?

Q. Does the requirements that apply to Registered Investment Advisors, to your knowledge, are you required to disclose to the public that you're a CFP and, or CPA?

A. Sure. I can't leave anything out. I have to comply with Florida law and Florida law, Chapter 517 requires that. I even had to give them something tangible in writing, and that is what they call the Brochure Rule. And the Brochure Rule also discloses this information for them.

MR. SAMPSON: I move to introduce into evidence Respondent's Exhibit's 5 and 6.

THE HEARING OFFICER: Respondent's 5 and 6 are admitted into evidence.

(Whereupon, Respondent's Exhibit 5 and 6 were received into evidence.)

BY MR. SAMPSON:

Q. I would like to hand you what has been marked as Petitioner's Exhibit 1. I believe that is a copy of your business card. I've got a copy of the unmarked one. Let me show you what appears to be an original. Would you identify what's been previously marked and introduced as Petitioner's Exhibit 1?

[p. 188] A. Yes, that's my business card for my firm.

Q. Where does it say on there that you're a public accounting firm?

A. It doesn't say that. It says "law offices."

Q. Are those cards distributed to your clients, or who are those cards given to?

A. I have some that are sitting on my desk, on a card tray. I have some that are sitting on the receptionist desk in the lobby. And, actually, the people I exchange cards with the most are other colleagues, whether they're CPA's or attorneys or CFP's at professional meetings or we have dinner seminars or whatever, I end up doing that a lot.

Sometimes a client will be sitting there and they'll pick up a card, or a potential client when they're sitting in front of my office – in front of my desk. So, there's a variety of uses.

Q. What is your understanding of the Department of Professional Regulation or Board of Accountancy's rational [sic] for allowing you to display your CPA license in your office?

A. As I understand it, they feel that if somebody sees it on the wall, that you can disabuse that person from thinking that you're practicing public accounting by just telling them, if they ask or if you want to mention [p. 189] it, I don't know what their requirements are, you know.

I'm not practicing public accounting, look at that certificate up there, but I'm not practicing public accounting. I assume that's what the rationale is. They have voiced that in the rule challenge that you have an opportunity to clear the air, if there was any confusion in the first place.

Q. Has there ever been confusion to your knowledge, with any of your clients about the type of practice you're engaged in?

A. No.

Q. Has there been any confusion in the minds of potential clients of yours that they've expressed to you about them being confused about the type of practice you're engaged in?

A. No, I've never heard anything about being confused.

Q. Have you ever heard anything from clients or potential clients that they have been misled by your using CFP or CPA?

A. Never.

Q. Are you familiar with prior proceedings instituted by the DPR against you for violating the holding out rule?

A. Yes, very familiar.

[p. 190] Q. Would you please explain the circumstances of those proceedings?

A. I didn't ask, in that case, exactly what was sent to them, but I believe some kind of either a business card or stationery, something like that was sent to the DPR back in 1985. And they sent me a letter that was very similar to the letter I got this time, which is, basically, we're looking at you for a possible misconduct and all this and everything that follows with misconduct and disciplinary proceedings. You have 30 days to respond to this.

And it was exactly the same issue using the CPA credential when they don't want me to use the CPA credential.

Q. What was the precise charge or allegation by the Probable Cause Panel?

A. They found no probable cause in 1986.

Q. I'm not asking the finding right now. I'm asking you what were they interested in. What were they investigating at the time? What particular conduct of yours were they looking at?

A. I know for a fact that they cited the Holding Out Rule 21A-20.012. I'm not sure which other rule or statute

they would have cited in addition to that to say that I was violating laws or rules. I'd have to look at [p. 191] that original inquiry letter back in 1985. I don't really recall what other citations they had in the letter.

Q. To you knowledge, was there an issue about your using CPA in your yellow pages or white pages ads?

A. I don't remember if it was the yellow pages, but I know it was something in writing. I think it might have been the stationery, as opposed to the yellow pages.

Q. This would be – which stationery is that?

A. At the time, I had a financial planning firm and my stationery and business cards said a financial planning firm.

Q. Were you a lawyer at the time?

A. I was a lawyer, I was a JD, but I didn't have a law office or a law firm at the time. I had a financial planning firm.

MR. SAMPSON: I'd like to have marked for identification as respondent's next exhibit –

THE HEARING OFFICER: Respondent's 7.

MR. SAMPSON: – memorandum of Finding of Probable Cause.

THE HEARING OFFICER: Memorandum of Finding of Probable Cause Panel 12/29/86.

(Whereupon, the documents referred to were marked at Respondent's Exhibit No. 7 for identification.)

BY MR. SAMPSON:

[p. 192] Q. Let me hand you now what has been marked as Respondent's Exhibit 7. Have you seen that document before?

A. Yes.

Q. Please identify the document, if you can.

A. This is a document that I had to pull teeth for to get. It took me quite a long time, but it was the official written conclusion, or result, of that initial inquiry that started in 1985. I asked them – they kept telling me over the phone, you're okay, you know, there's no probable cause, and they wouldn't put it in writing.

And I just had to follow it up forever, all the way up to the Attorney General's office. And I guess I got somebody mad at that point. And I had, I believe it was Mr. Tunnicliff, General Counsel for DPR, called me and said, "What do you want?" And I said, "I want it in writing." And he finally sent me this very quickly. As soon as I talked to Mr. Tunnicliff, they sent it.

Q. Let me clarify here that one of the issues that the Probable Cause Panel considered was whether your use of CPA in connection either with your letterhead or some other advertising was a violation of the Holding Out Rule 21A-20.012, is that correct?

A. Yes.

MR. SAMPSON: I move to introduce into evidence

[p. 193] Respondent's Exhibit 7.

THE HEARING OFFICER: it is admitted.

(Whereupon, Respondent's Exhibit No. 7 were received into evidence.)

BY MR. SAMPSON:

Q. Mrs. Ibanez, you are a CPA with an active license, correct?

A. Yes, sir.

Q. How do you consider your status as a CPA?

A. I am a CPA not engaged in public accounting. A simple way that I've seen, using literature to shorten that, is I'm a non-attesting CPA, not engaged in the practice of public accounting.

Q. Explain what your use of the phrase "non-attesting" means. Why is that significant to use that phrase?

A. It's real significant. The American Institute of CPA's every year published an annual financial statement, and they've made this entire list of over 300,000 CPA's with licenses across the United States. And this is right in the audited financial statements that are in the publication of the Journal of Accountancy that comes out every November of every year.

And there they classify the CPA's based on, are they engaged in public accounting or are they an industry, are [p. 194] they comptollers [sic], are they this, are they that. Are they in education, are they government, are they practicing lawyers, are they in the military, and

others. And they clearly recognize that there is a distinction. And they have the first category with big bold headline CPA's Engaged in Public Accounting. And then they have another bold for all the other classifications.

And, we're the biggest segment right now, according to the 1990, and what's right there in the audited financial statements. They're like 50 percent of all of the US's CPA's are not engaged in the practice of public accounting. We are non-attesting CPA's. We are in all these other fields out there. And they're in the minority now.

Q. Who are the "we" you're referring to?

A. We in industry, we in education, we in government, we in law firms, we as bankers, we as trust officers – I mean it affects so many different professionals. But all of them have one common denominator, and that is they are non-attesting CPA's.

They are non-attesting CPA's – they do not do the test [sic] function. That's really the only thing that binds them all together, because all of them in all those careers can certainly do anything else by being a CPA.

Q. You are a member of the AICPA – American [p. 195] Institute of Certified Public Accountants?

A. Yes, I am.

Q. From time to time, do you receive various dues statements from the AICPA?

A. Yes. As a matter of fact, I just got one not too long ago. Every year I get one.

MR. SAMPSON: I'd like to mark for identification a copy of the recent dues statement of the AICPA. Respondent's Exhibit 8.

THE HEARING OFFICER: Respondent's 8, the AICPA dues statement 7/31/92.

(Whereupon, the document referred to were marked Respondent's Exhibit No. 8 for identification.)

BY MR. SAMPSON:

Q. I'll hand you what has been marked Respondent's Exhibit 8. Is this a copy of your current dues statement from the AICPA?

A. Yes. There are two pages here, the front and then the back.

Q. Now, you refer to various codes that the AICPA assigns to various members. Have they assigned you a code?

A. Yes, since I'm a practicing attorney, my code is 96 based on the job codes that are explained on page 2, which is the back of the actual dues statement. And they [p. 196] have a code for everyone. And if they don't have one for you then you're other.

Q. What is Code 96 under the AICPA?

A. Code 96 is a practicing lawyer.

Q. I would like you to read under the job code section underneath the account number and year-ending line, the line that begins with job code.

A. They classify me as "Job Code 96, Practicing Lawyer."

Q. Is there a category for practicing public accountants?

A. Yes. They have one, two, three, four different subcategories all under the heading of the practice of public accounting. Those are codes 43, 44, 45, 46, depending on your status in the firm, if you're staff, supervisor, or partner.

Q. You are a sole practitioner of law, correct?

A. Correct.

Q. Is there a category for sole practitioners of public accounting?

A. Yes, they do. They have sole practitioners, Code 44 in the practice of public accounting.

Q. You haven't been assigned that code, have you?

A. No, and I shouldn't.

MR. SAMPSON: I move to introduce into evidence [p. 197] Respondent's Exhibit 8.

THE HEARING OFFICER: Respondent's 8 is admitted.

(Whereupon, Respondent's Exhibit No. 8 was received into evidence.)

BY MR. SAMPSON:

Q. Do you have any knowledge of the breakdown in Florida between non-practicing active CPA's and practicing CPA's?

A. Do you mean as to the Board of Accountancy or do you mean as to the Florida Membership Association,

because it's a different answer depending on which one you want.

Q. Let's take each of those. Let's first take the Board of Accountancy.

A. Well, I've asked the Board of Accountancy more than once, either through public records request and in other correspondance [sic]. And I've gotten two answers that confirm each other, and they confirm the law. And, that is, the only categories they have are CPA's with active licenses and CPA's that don't have active licenses. I believe that is the only distinction they have.

Q. Do you have any documentation about how the BOA breaks down CPA's?

A. I don't know. I don't know if they're interested. I don't believe they have other categories. [p. 198] I'm not trying to make light of it. I really don't think they have any other categories. That's what they told me in writing.

MR. SAMPSON: I'd like to have marked as Respondent's Exhibit 9, letter of March 25, '91.

THE HEARING OFFICER: Respondent's 9 for identification is 3/25/91 Ibanez to Willis letter.

(Whereupon, the document referred to were marked as Respondent's Exhibit No. 9 for identification.)

BY MR. SAMPSON:

Q. Mrs. Ibanez, please identify, if you can the Respondent's Exhibit 9.

A. It's a letter that I sent – public – one of my many public records I requested from Mrs. Martha Willis. And

she promptly answered me back. My letter was dated March 25, and she wrote me back just a few days later. I don't believe she signed her answer anywhere, but she did insert the answer after each one of my questions in the blanks within my letter. And that's what I refer to having received something in writing.

The third question in that letter asked about if you have any classifications of all of your licensees other than by an active license or not, please tell me what classification that is. And she said, "none, only categories are active and inactive."

[p. 199] Q Did you receive this letter back from Mrs. Willis, is that how it worked?

A. Yes. She answered my original letter. She inserted her answer right on the face of my original letter and returned my original letter back to me. Although, she did not sign it.

Q. The handwriting that is yours, appears where?

A. Mine is at the bottom of the letter.

Q. Your signature alone?

A. My signature.

Q. Do you know whose handwriting the rest of it is?

A. I assume it's Mrs. Martha Willis, but I don't know since she didn't sign it.

MR. SAMPSON: I move to introduce Respondent's Exhibit 9 into evidence.

THE HEARING OFFICER: Respondent's 9 is admitted without objection.

(Whereupon, Respondent's Exhibit No. 9 were received into evidence.)

THE HEARING OFFICER: Folks, we have been at it a little over an hour. Would anyone be prejudiced by a 10 minute recess?

MR. SAMPSON: No.

THE HEARING OFFICER: Mrs. Pam?

MRS. PAM: No.

[p. 200] THE HEARING OFFICER: Okay. Ten minutes.

(Whereupon, a recess was had and the proceedings resumed at 2:15 p.m.)

MR SAMPSON: What was the last exhibit number, please?

THE HEARING OFFICER: Nine has just been admitted.

BY MR SAMPSON:

Q. Mrs. Ibanez before the break, we were talking about various classifications of certified public accountants; those actively practicing or actively licensed and those who are not actively licensed under the Board of Accountancy's categorization, correct?

A. They have active and inactive, that's it.

Q. You have also indicated that the answer would be different on how CPA's are categorized within the

state of Florida, and we were talking about an entity, not the BOA, but some other entity. What were you talking about?

A. Well, we already talked about – across the United States – the national organization of CPA's, the National Membership Association, which is the ICPA [sic], and we talked about all their codes, But they're not the only ones that do it. Here in Florida, the FICPA also does it that way. They recognize and validate the existence of those of us that are not engaged in the practice of public [p. 201] accounting, and they have a code system to reflect that.

MR. SAMPSON: Let me have marked as Respondent's 10 for identification a memorandum of April 16th '91 and FICPA letter.

THE HEARING OFFICER: Respondent's 10 FICPA memo 4/16/91.

(Whereupon, the documents referred to were marked as Respondent's No. 10 for identification.)

BY MR. SAMPSON:

Q. Looking at Respondent's 10, can you identify that document? do you have any knowledge of that document?

A. Yes. I called the membership department of the FICPA. I called them before they were officially in the case by the way. So, I just called them because I'm in that association. And I said, do you have any membership statistics regarding – in Florida – either for the current year or for any year, do you have any based on what they practice in? What's CPA's practice; are they engaged in

the practice of accounting, or are they engaged in some other practices, whether it's law or banking or whatever it is.

They said, "Yes we do, we categorize it," and I said, "Well, can you give me a recent statistic as to how many there are in one versus the other; those in public [p. 202] practice and those not in public practice. And, she was very efficient, very quick – in a matter of days she sent me this memo.

Q. Who is she?

A. Debbie Mills, she's in the membership division of the FICPA, and she gave me this memo back just, basically, the statistics for the last five years from 1987 to 1991 – the percentage statistics.

Q. What is the percentage breakdown for April of '91 of the membership of the FICPA?

A. It's really curious because I remember seeing the memo, and she had Public Practice, 49 percent; and then she had Not in Public Practice, 35 percent. And, of course, being able to add and seeing that that didn't make a hundred percent, I called Debbie back on the phone. I said, "Debbie, that doesn't make a hundred percent. Is there something missing there?" She said, "Yes, they also have another category of people like associate and retirees and positions like that that are not in public practice." And they have that as like a third category. And, since I just asked in public practice, and not in public practice she just didn't add that third category. And if she had added it on the memo, it would make a hundred percent.

Q. Where do they put you, do you know?

[p. 203]A. I believe I'm in the "not in public practice" category because I know they have a code system that I don't have with me today, but it would be fairly easy to get from the FICPA.

Q. Is that similar to the AICPA code?

A. Very similar. They don't have the same numbers, but I believe the classifications on their two statements are almost pretty much verbatim, as far as the description. And they have different classifications under the practice of public accounting, and then they have all the other ones. They have members in industry, members in education, members in government, attorneys, military, retirees. I think the FICPA had that one different. They had an actual section for retirees, and I don't remember if the AICPA had that or not.

Q. To your knowledge, within the categorization of public practice by the FICPA, does the FICPA include any people based on whether they hold out as CPA's or not?

A. No, not at all; based on what we actually do, what our practice is and what we report to them on or dues statement and our representation to the organization.

MR. SAMPSON: I move to introduce Respondent's Exhibit 10 into evidence.

THE HEARING OFFICER: Respondent's 10 is admitted without objection.

[p. 204] (Whereupon, Respondent's Exhibit No. 10 were received into evidence.)

MR. SAMPSON: Thank you. I'd like to have marked as exhibit 11 for respondent, letter of August 26th '86 from the DPR.

THE HEARING OFFICER: Respondent's 11, 8/26/86 Feingold to Ibanez letter.

MR. SAMPSON: Thank you.

(Whereupon, the documents referred to were marked as Respondent's Exhibit No. 11 for identification.)

BY MR. SAMPSON:

Q. Would you please look at Respondent's Exhibit 11. Can you identify that letter?

A. Yes. That's a copy of the original letter that I got from Miss Jean Feingold. I believe, as I stated in – well, she has signed it – back then in 1986, she was the coordinator for the Continuing Education Division, and I had written her or asked her – I don't remember if I wrote her or asked her over the phone – but I requested information regarding the Active and Inactive license. Ever since back then I've been very interested in this whole issue, especially when it started back in '85.

Q. Would you please read the first paragraph for the record?

A. Sure. "Dear Mrs. Ibanez, according to the [p. 205] records of this Board, we show that you are currently licensed to practice (active status.) There are only two license statuses as far as this Board is concerned; active and inactive. An active CPA has the legal right to practice, but is not required to do so. In fact, many CPA's who

are licensed to practice are not presently in public accounting."

MR. SAMPSON: I move to introduce Respondent's Exhibit 11, the letter of August 26th '86 into evidence.

THE HEARING OFFICER: Respondent's 11 is admitted.

(Whereupon, Respondent's Exhibit No. 11 were received into evidence.)

BY MR. SAMPSON:

Q. Mrs. Ibanez, the yellow pages ad that you've been cited for in the amended administrative complaint, have you seen that ad?

A. Yes.

Q. Did you see the ad that was sent in to the Board of Accountancy?

A. Yes.

Q. Could you please describe the ad that you saw.

A. When I asked them to disclose to me exactly what, quote, was the complaint. You know, what is the [p. 206] name of the person who did it, was it a client, was it a member out there of the public, was it a CPA, was it anonymous.

And after they did that, to please send me, also, what it was. And they also had sent me some information just initially, without me even asking, when they first started the whole proceedings. They told me that it was

number one: anonymous. Number two: that there was no note. I guess no little yellow sticky pad saying this is a complaint, or no letter, no anything to disclose who was the sender.

And from my seeing it, it was only the yellow pages advertising, I believe. I'm not sure if they sent the white pages advertising. But, what I saw was the yellow pages attorney section advertising. And it had a big circle that somebody had put on there around my name. And my name in the yellow pages advertising had been circled. That was it. That's what I saw that had been sent in to the DPR – Board of Accountancy.

Q. You are employed by an entity Silvia S. Ibanez, P.A., are you not?

A Yes, I am.

Q. Is that the correct name – legal name of the employer?

A. Yes, it is. P.A. standing for Professional [p. 207] Association.

Q. Is that professional association required to be licensed with the Board of Accountancy?

A. Not at all. It's a law firm.

Q. Is there any exclusion, to your knowledge, in any of the holding out rules or the definitions of practicing public accountancy for employers who are not required to be licensed by the Board of Accountancy?

A. Absolutely.

Q. Where is that found?

A. A rule in Chapter 21 – 21A, if my memory serves me correct, 20.011 subsection A or 1. It's the first exclusion rule. And it says if you are, I believe, a governmental employee, or employed by an employer that's not required to be licensed under Chapter 473, then you are not practicing public accounting: irrespective of the activities.

I believe there is some jargon to that or language to that in the preamble to the rule.

Q. Let me talk a bit about activities since they seemed to be a focus, if you recall, at the rule challenge portion. Mr. Rimes asked you extensively about the activities you are engaged in. Do you recall that testimony?

A. Yes, I do recall it.

[p. 208] Q. And based on those questions that he asked you and your responses, do you still believe that you're not practicing public accountancy?

A. Yes.

Q. Even though you deal with –

A. Tax opinions, and things that other CPA's do, that's why we stipulate to it, yes. I still maintain wholeheartedly that I'm not practicing public accounting because that rule 21A-20.011 was made for all of us out there that do have some activities that are identical with the activities of the CPA's.

But, if we are working within a firm that's not a public accounting firm, and mine is not, that is deemed to

be a private employer. And I'm not deemed to be practicing public accounting. And there is many opinions to that effect, as well.

Q. Are you aware of any Board of Accountancy opinions to the effect that an employer who is not required to be licensed by the Board of Accountancy, is allowed to employ someone who can use the CPA credential?

Do you understand the question?

A. If you say it again, I probably will understand it.

Q. Let me ask you to assume that there is an employee who is an actively licensed CPA.

[p. 209] A. Yes, sir.

Q. And he works for an employer who is not a licensed certified public accounting firm with the Board of Accountancy –

A. Like a bank?

Q. – for example, a bank. Nor is that employer required to be licensed by the Board of Accountancy, are you aware of any opinions that would go to the issue of whether the employee can use CPA?

A. Yes. There is various opinions that, through my researches and asking for public records at request, there is many private employers. Some of these are banks, some are trust officers, some are mortgage brokers, some are investments people like Merrill, Lynch – an employee of Merrill, Lynch – some are insurance firms, some are

insurance administration firms. One was a sports management firm. There's all kinds of private employers out there.

Q. In any of those various opinions you've referred to – first of all, are those ones that have been officially recognized?

A. Yes, they have. I believe the FICPA introduced them in the rule challenge.

Q. Also, Brewster's attorney had some opinions officially recognized as you, yourself.

[p. 210] A. I believe so, yes. I introduced a few myself, yes, sir.

Q. In any of those examples you mentioned, did the Board of Accountancy approve the use of CPA by an employee of a firm that wasn't a CPA firm?

A. Yes, of a firm that was a private employer?

Q. Yes.

A. Several times. They say go right ahead, use the CPA credential.

Q. Are you familiar with the Zallus [sic], Cruz, Steinman and Williams opinions?

A. Yes, and I also have a digest for myself with a name and the date because that helped me to refresh my memory if I could –

Q. If you have that with you go ahead and look at it.

A. – look at that to refresh my memory?

Q. Sure.

A. Then I could give you the exact date of those opinions.

THE HEARING OFFICER: Mr. Sampson, let me take this opportunity to perhaps inquire where we're going. If these have already had official recognition in the disciplinary case, it is not necessarily helpful to me to have Mrs. Ibanez read [p. 211] them. I have two concerns. One, I think it would be cumulative to have her read them. And two, if they are already in this case, please tell me where. And, if they aren't in this case, do we need to do something specific evidentiary wise to get them into this case from the other one.

MR. SAMPSON: I understand both of those concerns. On the first one, we are not asking Mrs. Ibanez to read these opinions in. And I want to make certain that they are in evidence, and have been officially recognized.

THE HEARING OFFICER: If you have copies of them, I think –

MR. SAMPSON: Maybe that's the way to do it.

THE HEARING OFFICER: It would make a cleaner case, but I don't want to spend anybody's money unnecessarily.

MR. SAMPSON: They're not that many. There's only four, I believe.

THE HEARING OFFICER: Are they stipulated in the pre-hearing stip, or have they already been officially recognized and filed in this case?

MR. SAMPSON: They've been officially recognized in the rule challenge, I believe most of these. In terms of this case, it's my understanding we're [p. 212] adopting everything from the rule challenge that's in evidence, and if not, I'd like to move that we –

THE HEARING OFFICER: No, sir. That was not the arrangement, that you would make an arrangement and that you would move in whatever you wanted from the earlier case. And I specifically indicated that at the beginning of this hearing as to whether or not you folks asked those questions. Have you folks made arrangements as to how to do that; how to preserve the record from the other case, and how to preserve this record because they are now bifurcated. Do I understand that in this cause you want everything that was admitted in the prior cause?

MR. SAMPSON: With respect to the informal opinions and the testimony of the witnesses, yes.

THE HEARING OFFICER: Okay. Well, then we're going to have to –

MR. SAMPSON: I misunderstood you.

THE HEARING OFFICER: – make some arrangement to do that because the records are going to go to different locations at the conclusion of the final order case and the recommended order case. And that is what I tried to make clear to everybody before we started.

Additionally, on your pre-hearing stip, I [p. 213] understood that there were only the starred items that

anybody intended to adopt from the other case. That seemed to be what you were saying in that.

MR. SAMPSON: We intended to say that those had already been introduced and would not need to be reintroduced. The only new items were those that aren't starred on the list. We're dealing with our failure to communicate to you clearly what we want here.

THE HEARING OFFICER: The only things that you want from the other case are three starred items: the State of Florida CPA license, am I correct?

MR. SAMPSON: No. What we would like is that evidence that was introduced in connection with the rule challenge. Because one of our affirmative defenses is readopting the rule challenge. So, we want all the evidence from that to flow down into this case.

THE HEARING OFFICER: We've been through this about four times, Mr. Sampson. Let me see if I understand your pre-hearing stip because it appears you said something very different here. There are only three items starred on this revised Exhibit A of your pre-hearing stip. It indicates these have previously been submitted in the rules challenge.

[p. 214] It seems to me those are the only duplicate matters to some over from the original rules case challenging the holding out rule. Why are these listed here and none of the others listed from the other case, if you folks reached a stipulation?

MRS. IBANEZ: Can I answer to that? In the rule challenge, because we had such a difficulty in getting one list, all the parties in the rule challenge had their list of

exhibits. I suppose we had the misunderstanding that once there was a motion for official recognition on any of that, since we had asked for consolidated proceedings, anything that was on the record for the rule challenge, I thought I had heard you say and, I thought that we had an order to the effect that everything from the rule challenge on the record including exhibits submitted into the record, which the FICPA did, and Mr. Brewster and his law firm did – would be used here already on the record without having to be reintroduced.

What we did here was basically just go to the list of exhibits on items that we had on our original list Ibanez, in that case, Petitioner; in this case, Respondent. And rather duplicate everybody elses exhibit list, because they're all on different pages, we did not attach them to this pre-hearing stip and [p. 215] that is where – because we felt it was already in the record. And that's where – we apologize for any misunderstanding.

THE HEARING OFFICER: Okay. Mrs. Pam, what is your understanding with regard to your pre-hearing stipulation?

MRS. PAM: I think I had the same basic understanding that they did. From your order, it said – and I guess it was a misinterpretation of your order that said that we would still have the opportunity to adopt testimony and exhibits. I guess our failure was to make the arrangements to adopt the testimony and exhibits. But our communication back and forth –

THE HEARING OFFICER: If the parties have no problem with everything from the earlier rules case coming into this case, I don't either. However, you have a

logistical problem that may be insurmountable by your not recognizing it earlier. Let me explain the problem.

As I set out at the beginning of this hearing, there is a final order to be entered in the rules case. All of that record remains with the Division of Administrative Hearings absent an appeal. The entire record of the recommended order is sent back [p. 216] with the recommended order to the agency that then enters a final order. If you are going to adopt from one to the other, you may have a very difficult situation logistically with regard to how this is going to proceed.

In other words, you're going to have your exhibits in different locations for purposes of say, the entering of a final order by the Department of Professional Regulation al la Board of Accountancy, and the period of time during which you have to file your exceptions, whichever one of you doesn't like the final result here from me, and it's sitting over there while you still have potentially an appeal time running on the final order. Is everybody or anybody with me on this explanation?

MR. SAMPSON: I'm with you on that. This may or may not be the appropriate time to bring this up.

THE HEARING OFFICER: Let's try to solve all problems the best way we can, Mr. Sampson. What do you need?

MR. SAMPSON: We had intended to move that you abate making any decision in the disciplinary case until the outcome of the rule challenge, and all appeals that may pertain in that. So, logistically, you have the

record completely with the rule [p. 217] challenge until that was totally concluded.

The basis for that motion would be that if you find Mrs. Ibanez in violation of the rule, it's ultimately held to be invalid. Then she had been found subject to discipline, and has to report to people that she was found to be in violation of the rule of the BOA, that's ultimately on appeal or elsewhere held to be invalid.

THE HEARING OFFICER: I understand your concern, Mr. Sampson. It's not that I don't appreciate the legal issue that you're involved with. My concern right now is the logistical issue to help each of you try your best case. Abating the disciplinary case, pending the outcome of the holding out rule case, still leaves us with the problem of where the exhibits are at any given moment and this was something I tried to solve by consolidating these to begin with.

Mrs. Pam, let me hear your position on – I think an abatement is inappropriate. Let me see if there is procedural way that I can accommodate everyone. What would be your position on my retaining jurisdiction with regard to the disciplinary case, and giving you all an opportunity for proposed findings of fact and conclusion of law [p. 218] after the rules case is determined?

MRS. PAM: That's fine.

THE HEARING OFFICER: Mr. Sampson, an opinion on that one.

MR. SAMPSON: That's, I believe, fine with us. Yes, that's fine with us.

THE HEARING OFFICER: Let me think for just a moment, I think I just outsmarted myself. You would then have to have additional time for your proposals in this case, and that would conflict with your two periods of time – your different periods of time with two different procedural aspects.

MR. SAMPSON: If the concern is that we need to have a duplicate of the record, and that's certified to be an accurate copy of what has already been admitted in the rule challenge procedure, we can take care of that problem and get a duplicate made and certified by yourself or someone else and pay for that cost of doing that.

THE HEARING OFFICER: That was the original idea of trying to save you money by consolidating that. Do I truly understand you want to adopt all of the testimony from the rules case into the disciplinary case, and not just the exhibits?

MR. SAMPSON: Without combing the record again, [p. 219] I believe that is our position. There's been an affirmative defense raised here that the holding out rule is invalid. All the testimony we presented at the rule challenge would be pertinent to that affirmative defense here.

THE HEARING OFFICER: There's no dispute between these two parties as to the adoption of either the testimony or the exhibits from the earlier case. The parties are in agreement as to that being the appropriate way to try this one. I'm not going to second guess you, and make it difficult on you. I'm here to resolve disputes, I'm not here to make life difficult for anyone. I will permit you to do that by stipulation.

MRS. PAM: Is that your stipulation, Mrs. Pam?

MRS. PAM: Yes, it is.

THE HEARING OFFICER: Is that your stipulation, Mr. Sampson?

MR. SAMPSON: Yes.

THE HEARING OFFICER: Good. Let me clarify this record, if it is possible for me to do so. In the 91-3336R case, exhibits were designated Ibanez 1 through 9, Brewster 1 through 11, FICPA 1 through 17. Are you folks adopting these as joint exhibits? It probably makes no difference whatsoever except under [p. 220] the English common law. Are you all on the same wavelength? Some of these were not admitted in that hearing. You are adopting those that had been in evidence in that case, is that correct?

MR. SAMPSON: Yes.

THE HEARING OFFICER: Then it is not necessary to renumber any of the exhibits with regard to this case, because in this case we have used Petitioner and Respondent. Now, the next stage is to find out how we do not duplicate and I think that's what I just asked you all to look for.

(Whereupon, a discussion was had off the record.)

THE HEARING OFFICER: Very well, let's return to the record. Let me be entirely clear with my rule. I have ruled to ratify the parties' stipulation. The parties adopt into the record the DOAH Case No. 91-4100 all admitted exhibits, all testimony of all witnesses regardless or by whom offered or presented.

In the record of Case No. 91-3336R that is not to say that anything admitted or oral testimony from today's disciplinary hearing will be considered in the rules case for which the record has already closed. And that there will be a post-hearing order entered after today's hearing permitting the parties [p. 221] in both cases to advise me by memorandum or however, how the Court should handle the record, and the dates for the proposed findings of fact and conclusions of law in this case and in the proceeding rules case.

There may need to be some adjustment as to proposals in the other case as a result of this. I'll give everybody ten days to advise me, if necessary, I'll schedule a telephone conference call. Understood?

MR. SAMPSON: Yes.

MRS. PAM: Yes.

THE HEARING OFFICER: They all understand. Okay. Proceed, Mr. Sampson.

BY MR. SAMPSON:

Q. Mrs. Ibanez, before all that confusion about the record, from our part I guess, occurred, I was asking you about some various opinions you were aware of by the Board of Accountancy relating to –

A. Private employers.

Q. – private employers, correct; and whether or not that issued opinion on whether employees of such private employers could use CPA, and you indicated you were familiar with some opinions, am I correct?

A. Yes, I am familiar with them.

[p. 222] MR. SAMPSON: I would like marked as a composite exhibit for respondent, opinions that we believe are not previously in the record.

THE HEARING OFFICER: This is going to be Composite R-12?

MR. SAMPSON: Yes.

THE HEARING OFFICER: Do you we have something that will make them composite? R-12 BOA opinions. How many?

MR. SAMPSON: I believe there are eight.

THE HEARING OFFICER: Very well. A composite, eight Board of Accountancy opinions.

(Whereupon, the documents referred to were marked as Respondent's No. 12 for identification.)

MR. SAMPSON: I move to introduce into evidence Respondent's Exhibit 12. Mrs. Pam, have you had an opportunity to look through those?

MRS. PAM: I have no objection.

THE HEARING OFFICER: Very well. Without objection, Respondent's 12 is admitted.

(Whereupon, Respondent's Exhibit No. 12 were received into evidence.)

MR. SAMPSON: Thank you. I have no other questions of Mrs. Ibanez at this time.

THE HEARING OFFICER: Are you ready for cross, [p. 223] Mrs. Pam?

CROSS EXAMINATION

BY MRS. PAM:

Q. If you contend that you're not in the practice of public accounting, why is it that you use the CPA designation?

A. Because I've very proud of it, and I am a CPA and there's various Florida laws that require me to disclose it. I have to comply with the law.

Q. Have you testified that you perform some of the same services in your law firm that CPA's perform for the public?

A. There are many activities that are identical of various professions with that of CPA public accountanting it's stipulated to.

Q. It's your contention then that although you're providing the same services, you're not practicing public accounting?

A. Correct, because of the rule that excludes me from that.

Q. And you're talking about Rule 20.011?

A. Yes, ma'am.

Q. Do you provide services for the public?

A. That rule just says that I'm working for a private employer. So, based on that rule, it doesn't [p. 224] matter who I'm providing services for. That rule says if I'm working for a private employer that's not required to be

registered under 473, and I work for my law firm, which is a private employer.

Q. But you are providing services to the public?

A. Yes, but I don't believe that's required in the exclusion rule to be proved anywhere.

Q. If you were practicing public accounting in your law firm, say you were doing the dual professions, would you then have to register your law firm as a public accounting firm?

A. Are you saying in the hypothetical that I wanted to have two practices?

Q. In the hypothetical that you are practicing public accounting and practicing law.

A. And what is the question?

Q. Do you think you would have to license your law firm?

MR. SAMPSON: Object to the question. It assumes facts that are not nor will they be in evidence.

THE HEARING OFFICER: Overruled.

MRS. IBANEZ: If I had a separate practice, and I was also practicing public accounting, then that firm would be registered with the appropriate party [p. 225] as a public accounting firm. And, probably, I would have it in a separate entity as well. So, there's a lot of legal things I would do differently as well.

BY MRS. PAM:

Q. Do you think that you could practice public accounting in your law firm?

A. Well, I don't practice public accounting in my law firm so are you asking me another hypothetical?

Q. Do you think that you could?

A. I believe that in my law firm, what I do is practice law.

Q. But, do you believe that in your law firm practice, that you could also provide public accounting services?

A. I believe I could provide services that are identical. I wouldn't call them public accounting services ever. That's BOA's wrongful use of the term.

Q. If you decided that you wanted to do tax returns, do you think you could do that out of your law firm?

A. Other estate planning attorneys do, and they're not CPA's, and they're not accused of practicing public accounting. They do 706's all the time, right and left. I don't, by the way, but they do.

So, I certainly could do it as a law firm, and I [p. 226] don't think anybody would say that is an activity that is the practice of public accounting.

Q. Do you use the CPA designation on your law firm stationery?

A. No. But I have on my stationery Silvia S. Ibanez, P.A. and Attorney at Law, and I have some membership designations that apply to me.

Q. Why don't you use the CPA designation on your letterhead?

A. I may at any time. I certainly think I have the right to do so.

MRS. PAM: I don't have any further questions.

THE HEARING OFFICER: Redirect?

MR. SAMPSON: No.

THE HEARING OFFICER: Okay. Next witness.

MR. SAMPSON: Respondent rests.

THE HEARING OFFICER: You sure?

MR. SAMPSON: Yes.

THE HEARING OFFICER: Okay. Do we need a recess prior to rebuttal?

MRS. PAM: There won't be any.

THE HEARING OFFICER: Would it be more comfortable for the parties to take a brief recess now, and then we'll go through formally on the record what you want to do about post-hearing procedure or [p. 227] do you have enough stamina to do it now?

MRS. PAM: We can do it now.

MR. SAMPSON: That's fine.

THE HEARING OFFICER: Normally, at the commencement of hearing, I give you my little spill [sic] about the four questions that I will ask at the end of hearing. And they usually are: Does anyone wish to have oral closing? Does anyone wish to provide a transcript? Does anyone wish to do post-hearing for post-findings of fact and conclusions of law, and if so, how long do you need to do it.

At this time, since everyone appears to be relatively familiar with the issues in this case, I have not gone through that spill [sic] at the beginning of hearing, I have just done so now. Having told you the questions I am going to ask, here they are. Does anyone wish oral closing?

MRS. PAM: No.

MR. SAMPSON: Mrs. Ibanez would like to make a short oral closing.

THE HEARING OFFICER: Okay. Fine. She's entitled. Will anyone be providing a transcript?

MRS. PAM: Yes.

THE HEARING OFFICER: Thank you. How long do you think you need to do your proposals, if you can [p. 228] tell me that now.

MR. SAMPSON: It's going to depend on the logistical problem with the record. I think 20 days.

THE HEARING OFFICER: I think that's a wise choice. It would be good if we could put at least a time frame on it now that would not hold everyone to a 30 day statutory problem. Twenty days for each side agreeable absent of the subsequent order, Mrs. Pam?

MRS. PAM: That's fine.

THE HEARING OFFICER: Since we have done this on the record and have done it quickly, I don't think it's necessary for me to reiterate the stipulations. You may have oral closing.

MRS. IBANEZ: I would like to just make reference to the fact that most of the legal argument that would be appropriate in closing will be articulated in the proposed findings of fact and conclusions of law.

I would just like to make one or two points for emphasis only, certainly not to exclude anything else. One is, I know that in the pleadings and in the defenses, there have been a lot of references to public interest and substantial government interest, and a lot of that phrase and terminology [p. 229] refers to constitutional reflections on those terms.

I would like to remind all the parties in the current proceeding that the public interest and the public welfare is also very much articulated in Chapter 455. And Chapter 455 in the regulation here in Florida, of all professional regulations, the first and foremost concern is unlicensed professionals, which I am not. I am licensed.

I don't understand this whole focus of BOA with all the unlicensed professionals out there, run the gammut, why they are spending time and resources on this. But, that focus, I don't believe, is even within the framework of going after licensed professionals. But assuming it were, under Chapter 455, of focus to be contemplated, there's still a balancing of interest, and Chapter 455 says there is a balance of interest.

It says if you are going to regulate a practice or a profession, it still must be balanced by those concerns that are to benefit the public. For the public benefit, the welfare of the public and certainly not ending up in a monopolistic or a restriction on competition. I think all the testimony as will be fully articulated in the proposed

findings of fact and conclusions of law, and [p. 230] all references to the record will clearly point out two things.

Number One: That whenever any complaint came from a private employer that was seen by the Board of Accountancy as quote no threat to competition; for example, an insurance administration firm. They said, you're working for a private employer. So, they first look at the private employer, first. That was their first focus of concentration. And, secondly, they would say, since you are an employee of a private employer that doesn't have to be registerd [sic] under 473, consequently, you are not in the practice of public accounting just an exclusion in 21A-20.011 benefits you.

However, as soon as the complaint regarding an attorney – perfect example is Mr. Brewster; perfect example is Damitz, who's one of our entrys [sic] in the record. Instead of continuing the same rational [sic] in judgment for the private employers, instead of looking at her law firm first, and saying "law firm" all right, that is a private employer. Then look at the individual and say this individual is employed by that law firm, it's a private employer; therefore, she benefits from the exclusion. Low [sic] and behold, the complete thought process and rationale, as applied by [p. 231] BOA, is now focusing not on the employer, it's now all of a sudden focused on business competition.

So, let's start – our first step shouldn't be the employer. Let's look at the individual first. Let's look at her activities. And, so you find it's consistent in the opinions that when somebody that offered competition, such as the case of Ms. Damitz, such as the case of Mr.

Brewster, such as is my case, they looked at the individual first, looked at the activities, said, oh, any of these activities are going to fall into the practice of public accounting; therefore, that makes her law firm, Ms. Damitz, Mr. Brewster, Mrs. Ibanez, ergo, in the practice of public accounting, and some rule is being violated.

So, all of a sudden the entire thought process and shift changes a hundred and eighty degrees, and the results are a hundred and eighty degrees different. We are asking for fairness. We are asking to put everybody on the same scale, on the same balance; no different than you would look at the exclusions of governmental employees.

And this will be my last point, if there is a very good exclusion in that 20A-20.011 for governmental employee – same rationale with governmental employee. They don't look at the [p. 232] activities. There's even an opinion on one that's a Department of Revenue tax auditor. Tax auditor, my gosh, if they had started with the activities first, and then said, we are going to analyze activities first; come to the conclusion that in that activity he's practicing public accounting, ergo, the Department of Revenue, State of Florida, is now in the practice of public accounting, they would never be able to testify to that.

So, anybody they deem is not competition they start as they should. They start with the entity focus first. They look at the entity. Is the entity one that benefits from that exclusion because they're either governmental or private employer? If they answer that yes, then it doesn't matter what the activities are of that professional, that is a CPA licensee. Automatically without looking any further,

without any questions, without doing any investigation, they say to that person, yes, you can use the CPA credential.

All I'm asking is for fairness. They're not misleading anybody when they use the CPA credential and I am not either. We just truthfully express to the public something they have a right to know, and something we most definitely have a right to say. [p. 233] Thank you.

THE HEARING OFFICER: Is there anything else that I need to know to make this easier on anyone? Before you all leave the room, if you would, please, check the exhibits and make sure I have all of them and no witnesses walked off with them. I appreciate your attention, folks, this hearing is concluded.

(Whereupon, the proceedings were concluded at 3.25 [sic] p.m.)

[p. 234] CERTIFICATE

THE STATE OF FLORIDA,

COUNTY OF LEON.

I, L. Carolyn Bilbrey, court reporter and Notary Public, at Tallahassee, Florida, do hereby certify as follows:

That I correctly reported in shorthand the foregoing proceedings at the time and place stated in the caption hereof;

That I later reduced my shorthand notes to typewriting, or under my supervision, and that the foregoing pages, 4 through 122, both inclusive, contain a full, true,

and correct transcript of the proceedings on said occasion;

That I am neither of kin, nor of counsel, to any parties involved, nor in any manner interested in the result thereof;

This 13th day of September, 1991.

/s/ L. Carolyn Bilbrey
L. Carolyn Bilbrey
Notary Public
State of Florida at Large,

My Commission expires: December 12, 1994

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SILVIA S. IBANEZ, Petitioner, and JAMES R. BREWSTER and AMERICAN ASSOCIATION OF ATTORNEY CERTIFIED PUBLIC ACCOUNTANTS, Intervenors, vs. STATE OF FLORIDA, DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF ACCOUNTANCY, Respondent, and FLORIDA INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, Intervenor.	)	CASE NO. 92-3336R

FINAL ORDER

Upon due notice, this cause came on for formal hearing on August 1 and 2, 1991, in Tallahassee, Florida, before Ella Jane P. Davis, a duly assigned Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

FOR PETITIONER SILVIA S. IBANEZ:	Silvia S. Ibanez, Esquire P.O. Drawer 7667 Winter Haven, FL 33883 and Michael P. Sampson, Esquire Holland & Knight P.O. Box 32092 Lakeland, FL 33802-2092
FOR RESPONDENT STATE OF FLORIDA, DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF ACCOUNTANCY:	John J. Rimes, III Assistant Attorney General Department of Legal Affairs The Capitol, LL04 Tallahassee, FL 32399-1050
FOR INTERVENOR JAMES R. BREWSTER:	Julie Gallagher, Esquire Stowell, Anton & Kraemer P.O. Box 11059 Tallahassee, FL 32302
FOR INTERVENOR AMERICAN ASSOCIATION OF ATTORNEY CERTIFIED PUBLIC ACCOUNTANTS:	Thomas W. McCulloch, Esquire McCulloch, Ellis & Payne Suite 800 6671 Southwest Freeway Houston, TX 77074 and Sydney S. Traum, P.A.

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STATEMENT OF THE ISSUE

Whether or not existing Rule 21A-20.012 *F.A.C.* is an invalid exercise of delegated legislative authority. See Sections 120.52(8) and 120.56*F.S.*

PRELIMINARY STATEMENT

Petitioner filed a petition on May 10, 1991 challenging the validity of Rule 21A-20.012 *F.A.C.*, a rule upon which a pending disciplinary action against the Petitioner is based. The two cases, the rule challenge and the disciplinary action, were first consolidated, but were subsequently bifurcated and this final order relates solely to Petitioner's challenge to Rule 21A-20.012 *F.A.C.*

At formal hearing, Petitioner Ibanez presented her own oral testimony and that of John E. Sullivan, John R. Rowe, and Martha Willis. Petitioner's Exhibits, Ibanez 1-5 and 7-9, were admitted in evidence. Intervenor James R.

Brewster presented no oral testimony, but had Brewster Exhibits 1, 2, and 6-11 admitted in evidence. Intervenor American Association of Attorney Public Accountants (AAA-CPA) presented neither witnesses nor exhibits.

Respondent presented the oral testimony of Petitioner Silvia Ibanez and Dean Dennison. Intervenor Florida Institute of Certified Public Accountants, (FICPA's) Exhibits 1-17 were admitted in evidence, without independent oral testimony.

Official recognition was taken of many items as reflected in the record.

A transcript was filed in due course and all timely filed proposed findings of fact have been ruled on in the appendix to this final order, pursuant to Section 120.59(2), *F.S.*

FINDINGS OF FACT

1. Petitioner Silvia S. Ibanez is a practicing attorney and a member of the Florida Bar, and holds active Florida CPA License No. 10842, currently in good standing. She is also a Registered Investment Advisor with the Florida Division of Securities and a certified financial planner (CFP). She has been charged with violating Rule 21A-20.012 *F.A.C.* in DOAH Case No. 91-4100 which is currently pending before the Division of Administrative Hearings.

2. As a license with the federal Securities and Exchange Commission. Petitioner is required to, and does, disclose the fact that she is a CPA.

3. Petitioner Ibanez is listed in the yellow pages under the heading "Attorneys" as "Ibanez, Silvia, S., CPA, CFP." On its face, there is nothing false or fraudulent about this listing. As an attorney, Petitioner also places CPA after her name on her business cards and on her letterhead. Respondent contends that *because* Petitioner "holds out" to the public as a CPA, uses accounting skills, and provides one or more types of management, advisory, or consulting services, she is currently "practicing public accounting."

4. Intervenor James R. Brewster is also a practicing attorney, a Board-certified tax lawyer, and a member of the Florida Bar, and holds an active Florida CPA license. Mr. Brewster has been charged with violating Rule 21A-20.012 F.A.C. in DOAH Case No. 90-3278 which is currently pending before the Division of Administrative Hearings. The administrative complaint therein charges violations of Rule 21A-20.012 *F.A.C.*, and Sections 473.323(1)(a), (g), and (h) *F.S.* on the basis that Brewster's law firm letterhead designates him as a "CPA" and the law firm is not licensed by the Board of Accountancy as a public accounting firm.

5. Intervenor American Association of Attorney Public Accountants (AAA-CPA) is a not-for-profit corporation with its principal place of business in Mission Viejo, California. Founded in 1964,-the AAA-CPA is an active professional organization of persons dually qualified as both attorneys and CPAs. It membership is comprised of practitioners in public accounting, law, government, education, and other activities. One of the functions of the AAA-CPA is to engage in the analysis

and discussion of ethical and other issues related to practitioners who are dually licensed in the accounting and law professions. This includes monitoring and commenting upon legislation affecting the practice of law and public accountancy and participating in the development of ethical standards of lawyers and CPAs. AAA-CPA's substantial interests are affected by this proceeding in that its members are CPAs who are directly affected by the definition, scope, and regulation of the practice of public accounting by Florida Statutes and rules.

6. Respondent board of Accountancy is an agency of the State of Florida established pursuant to the provisions of chapter 473 *F.S.* Pursuant to Section 473.301 *F.S.*, the Board is authorized in the following language to regulate the "practice of public accounting":

> 473.301 Purpose. – The Legislature recognizes that there is a public need for independent and objective public accountants and that it is necessary to regulate the practice of public accounting to assure the minimum competence of practitioners and the accuracy of audit statements upon which the public relies and to protect the public from dishonest practitioners and, therefore, deems it necessary in the interest of public welfare to regulate the practice of public accountancy in this state.

7. Respondent Department of Professional Regulations is an umbrella agency for the Board of Accountancy, established under the provisions of Section 20.16 and Chapter 455, *F.S.*

8. Intervenor Florida Institute of Certified Public Accountants (FICPA) is a Florida not-for-profit corporation with its principal place of business in Tallahassee. Founded in 1905, the FICPA is an active professional organization with approximately 17,800 members. Its membership is comprised of practitioners in public accounting, industry, government, education, law, and other activities. One of the functions of the FICPA is to engage in the analysis and discussion of issues related to the accounting profession. This includes monitoring the scope of services provided by certified public accountants in Florida and throughout the United States, monitoring legislation affecting the practice of public accountancy, and participating in the development of auditing, accounting, and ethical standards of CPAs. Intervenor FICPA's substantial interests are affected by this proceeding in that its members are CPAs who are directly affected by the definition, scope, and regulation of the practice of public accounting by Florida Statutes and rules. It is even recognized in the statute. See, Section 473.302 *F.S., infra.*

9. Challenged existing Rule 21A-20.012 F.A.C., also referred to as the "holding out" rule, provides as follows:

> 21A-20.012 Holding Out. "Holding himself or itself out" as used in Section 473.302(4), F.S. is defined as publicizing that the licensee is certified public accountant when providing, or offering to provide services or products to the public, in such a manner that an uniformed person may not be able to differentiate whether or not the licensee may also be in the practice of public accounting. The display of the CPA certificate

> and license issued by the Department of Professional Regulation shall not constitute holding out under the terms of this rule. all other publication of the fact that a licensee is a CPA constitutes holding oneself out.

10. The specific statutory authorities currently cited by the agency for the rule are Sections 473-302, 473.304 and 473.307 *F.S.* and the law implemented is cited as Section 473.302 *F.S.* Section 473.307, dealing with "experience," does not impinge on these proceedings. the remaining authorities provide as follows:

473.302 Definitions – As used in this act:

(1) "Board" means the Board of Accountancy.

(2) "Department" means the Department of Professional Regulation.

(3 "Certified public accountant" means a person who holds a license to practice public accounting in this state under the authority of this act.

(4) *"Practice of," "practicing public accountancy," or "public accounting" means:*

(a) Offering to perform or performing for the public one or more types of services involving the use of accounting skills or one or more types of management advisory consulting services, by a certified public accountant or firm of certified public accountants, of this state, including the performance of such services in the employ or another person; or

(b) Offering to perform or performing for the public one or more types of services involving the use of accounting skills or one or more

types of management advisory or consulting services, by any other person *holding himself or itself out* as a certified public accountant or firm of certified public accountants, including the performance of such services by a certified public accountant in the employ of a person so holding himself or itself out.

However, these terms shall not include services provided by the American Institute of Certified Public Accountants, the Florida Institute of Certified Public Accountants, or any full service association of certified public accounting firms whose plans of administration have been approved by the board, to their members or services performed by these entities reviewing the services provided to the public by members of these entities. [*Emphasis supplied*]

473.304 Rules of board. – The board shall adopt all rules necessary to administer this act. Every license shall be governed and controlled by this act and the rules adopted by the Board.

11. Also relevant to these proceedings is Section 473.322 *F.S.* which provides as follows:

473.322 Prohibitions: penalties. –

(1) No person shall knowingly:

(a) *Practice public accounting* unless the person is a certified public accountant or a public accountant;

(b) Assume or use the titles or designations "certified public accountant" or "public accountant" or the abbreviations "C.P.A." or any other title, designation, words, letters, abbreviations, sign, card, or device tending to indicate that such person holds an active license under

this act, unless such person holds an active license under this act;

(c) Attest as an expert in accountancy to the reliability or fairness of presentation of financial information or utilize any form of disclaimer or opinion which is intended or conventionally understood to convey an assurance of reliability as to matters not specifically disclaimed unless such person holds an active license under this act. This subsection shall not prevent the performance by persons other than certified public accountants of other services involving the use of accounting skills including the preparation of tax returns and the preparation of financial statements without expression of opinion thereon.

(d) Present as his own the license of another;

(e) Give false or forged evidence to the board or a member thereof for the purpose of obtaining a license:

(f) Use or attempt to use a public accounting license which has been suspended, revoked, or placed on inactive status;

(g) Employ unlicensed persons to practice public accounting; or

(h) Conceal information relative to violations of this act.

(2) Any person who violates any provisions of this section is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. [*Emphasis supplied*]

12. Although it has been challenged, Rule 21-A-21.008 *F.A.C.*, the "other business activity rule," is relevant to these proceedings. That existing rule currently provides as follows:

> 21A-21.009 Other Business Activities. *A licensee engaged in the practice of public accounting may concurrently engage in another business, occupation, or profession if:*
>
> *(1) The licensee does not hold himself out as a certified public accountant in the activity,*
>
> (2) The activity is conducted under a name which the public will not associate with licensee's practice of public accounting.
>
> (3) The other business, occupation, or profession is not used to promote the practice of public accounting in any manner prohibited by Chapter 473, F.S.,
>
> (4) Facilities used by the licensee in his public accounting practice and other activity conform to the requirements of 21A-26.00(3),
>
> (5) The entity's dealings with the licensee's public accounting clients shall not violate the provisions of Chapter 473, F.S., and 21A, Florida Administrative Code, relating to integrity and objectivity,
>
> (6) The entity does not interpret financial statements, forecasts or projections audited, reviewed, compiled or prepared by others. [Emphasis supplied]

13. Although it has not been challenged, Rule 21A-20.011 *F.A.C.* is relevant to these proceedings. That existing rule currently provides as follows:

> 21A-20.011 Practice of, or Practicing Public Accountancy. *"Practice of, or practicing public accountancy" as defined by Section 473.302(4), F.S., shall exclude any of the following:*
>
> (1) Services rendered by a licensee as an employee of a governmental unit or an employee rendering accounting services only to his employer as long as that employer is not required to be licensed under F.S. 473, or
>
> (2) Activities of licensees *who do not hold themselves out* as CPAs and who are not associated with financial statements, or
>
> (3) Activities of licensees *who do not hold themselves out* as certified public accountants. [*Emphasis supplied*]

14. Petitioner's and Intervenor Brewster's CPA certificates (like all Florida APA certificates) authorize them to display their CPA credentials. The CPA certificate represents that the recipient

> . . . has passed all examinations and has met all other requirements prescribed by law and by rule of this board for certification as an expert public accountant, and *is therefore entitled to append the letters CPA after this registrant's name to evidence registration by this board as a Certified Public Accountant.* [*Emphasis supplied*]

15. The Board's only classifications of CPA licenses/licensees are "active" or "inactive." "Active" and "inactive" refer to the status of the CPA license and do not refer to or imply that the licensee is actively practicing public accounting. One can be an actively licensed CPA and not be practicing public accounting.

16. Attainment of the CPA credential is an accomplishment that is recognized in the business community. The CPA credential of a Florida-licensed CPA connotes high competency and achievement levels in the discipline of accounting. Truthful communication of the CPA credential by actively licensed CPAs for identification purposes constitutes valuable disclosure to the public.

17. The use of the term "CPA" implies a specific competency to the public. The fact that Petitioner Ibanez or Intervenor Brewster is a CPA is valuable to their respective legal clients.

18. CPA status is a valuable property right to each CPA, and the ability of a practicing attorney to publicize the fact that s/he also holds an active CPA license is a valuable asset to that individual.

19. It is conceded by all parties that it is possible to practice law and public accounting in the same business activity.

20. There are firms that simultaneously hold themselves out as law firms and public accounting firms.

21. The activities of other regulated professionals, such as members of the Florida Bar, which overlap those of practicing CPAs are subject to the regulatory standards of their principal regulated professions and applicable judicial and administrative remedies for malpractice and negligence.

22. It is conceded by all parties that many activities conducted by professionals and nonprofessionals, other than by CPAs and other than by attorneys, are identical to

activities performed by CPAs engaged in public accounting. For instance, anyone can legally prepare a tax return. Bookkeepers and free-lance tax assistors of all sorts are unregulated in any way.

23. The only activity among public accounting activities that is a unique activity of CPAs is the "attest" function. See, Section 473.322(1)(c) *F.S.*

24. Truthful use, communications, or disclosure of the CPA credential by an actively licensed CPA does not *per se* constitute false, misleading, or deceptive advertising. The evidence does not support a finding that withholding truthful disclosure that one has earned the CPA credential benefits the public welfare or effects the purposes of the enabling legislation, or indeed, how such nondisclosure could promote them, particularly since it has been shown that persons of considerably lesser competency and achievement levels in the discipline of accounting may legally offer to the public almost all the services provided by CPAs.

25. Prior to 1984, when the "holding out" rule was adopted, a Florida-licensed CPA who offered one or more types of accounting services to the public or who offered one or more types of management advisory or consulting services to the public was considered to be "practicing public accountancy," whether or not that person appended the initials "CPA" after his or her name.

26. The "holding out" rule became effective on September 17, 1984.

27. Chapter 89-87 *Laws of Florida* amended Section 473.302(4) *F.S.* (i.e., the definition of public accountancy)

but the amendment did not change the previously existing "holding out" language therein.

The "holding out" rule was adopted more than one year before the initiation of this rule challenge.

29. There is no dispute among the parties that the definition within the challenged Rule 21A-20.012 *F.A.C.* is circular. In attempting to define the term "holding out" so that the use of that term in Section 473.302(4) *F.S.* may be clarified, the rule incorporates the statutory phrase "practice of public accounting," and the term "practice of public accountancy/accounting" in Section 473.302(4)(b)*F.S.*, incorporates the term "holding out,"[1] as does Rule 21A-20.011 *F.A.C.*,[2] which creates exemptions to the statute.

30. At least one purpose of the second sentence of the existing rule seems to have been to allow all CPAs to display their CPA certificates on their inner office walls without fear of disciplinary action by the Board. The Board's expressed rationale for excluding "display of a CPA certificate" from its "holding out" rule is premised on the fact that during an office visit, a CPA can immediately disabuse any individual of the fact that s/he is practicing public accounting once that individual is inside the CPA's office. However, Petitioner demonstrated, and the Board conceded, that an individual may have the opportunity to disabuse members of the public that s/he is engaged in the activity of the practice of public accounting or that s/he is offering all the services

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[1] See Finding of Fact No. 10, *supra*.

[2] See Finding of Fact No. 13, *supra*.

normally associated with a CPA, as opposed to law or some other profession, at least where there is direct contact by letter or telephone.

31. Clearly, there are many ways a nonattesting, activity licensed CPA who is dually licensed can clarify to those seeking his or her services which profession, function, or service s/he is willing to perform for that client.

32. On the other hand, the challenged rule does not deal with all members of the public, or members of the public specifically seeking CPA services, or members of the public seeking some other service. The rule deals with "uninformed persons." As used in the rule, the term "uninformed person" is undefined and has been subject to differing speculative interpretations by the Board and by non-Board witnesses, some of which interpretations address such broad categories as anyone using a telephone book.

33. The Board also suggested that only display of the original CPA certificate on an inside office wall would be exempt from prosecution for publication, but a reasonable person could interpret the rule on its face to permit posting the CPA certificate or an exact facsimile of the certificate on a sign outside an office building or circulating as business cards exact reduced-size copies of the certificate even though these types of "publication" or "display" would not provide the same opportunity as an office visit would provide for the CPA to disclose to individuals the actual services the CPA was offering to perform.

34. Accordingly, there has been no rational basis for the "holding out" rule's distinction between "display" of

the licensee's CPA certificate and other forms of truthful, nonmisleading publication of the CPA licensure/status.

35. The agency's expressed rationale behind its adoption of the "holding out" rule was to define the meaning of the statutory term "holding out," as used in Section 473.302(4)*F.S.*, a term which has also been adopted into a number of other rules (see, *supra*), so as to provide guidance on when a person who has been licensed as a CPA is engaged in the "practice of public accounting." Specifically, the Board maintained that the "holding out rule" and the "other business activity rule" given licensees two options. Under the first option, the "holding out" rule permits licensees to retain their CPA certificates when not in compliance with all of the provisions of Chapter 473*F.S.*, and the rules promulgated thereunder, as long as they do not publicize themselves as CPAs. Alternatively, the Board perceives that under the second option, if licensees do publicize themselves as CPAs when performing services for the public, licensees become subject to regulation by the Board and are held to the standards of competency and conduct which are applicable to all CPA's who use their accounting skills for the public while trading on the fact of their licensure as a Florida CPA.

36. However, the words "publicizing" and "publication" as used in the "holding out" rule are also undefined. Although Respondents submitted that the "common usage" of these words is sufficient to embrace listings in the yellow pages, it is also quite possible to give these words as a far broader reading to encompass the "assumption" and "use" of the designation "CPA" and the "assumption" and "use" of the CPA credential,

which "assumption" and "use" are specifically reserved to all actively licensed CPAs and which designation is permitted to be inserted after their names on signs, cards, or devices by Section 473.322(1)(b)*F.S.* [see Finding of Fact No. 11] and by the CPA certificate itself which permits them to "append" CPA after their names [see Finding of Fact No. 14].

37. The rule *has* actually subjected CPAs, and specifically has subjected Petitioner and Intervenor Brewster, to DPR disciplinary proceedings independent of any other act or wrongdoing merely for any "publication" of the CPA credential in a form other than display of the original CPA certificate on an inner office wall. The rule *may* automatically subject attorney-CPA licensees to DPR disciplinary proceedings independent of any other act or wrongdoing merely on the basis of passive, truthful communications which are otherwise in full compliance with the standards of the Florida Supreme Court and Florida Bar. The rule has the potential for being interpreted so as to prohibit CPAs such as Petitioner and Intervenor Brewster from making disclosures of their earned status as CPAs to various regulatory bodies to which they are required by law to disclose that information. See, Findings of Fact 1 and 2, *supra*. The rule can be invoked to limit their income by chilling their appearance as expert CPA witnesses for a fee even if they never work for an uninformed lawman at all. Applicants for certain state employments and candidates for public office may run afoul of the rule due to the disclosure requirements of public office. Even at risk is the CPA called as a factual witness who is then sworn to tell the truth and asked innocuous biographical information. One's desire to

attain a CPA credential may be chilled by the hazard of using it.

38. Chapter 473 *F.S.* contains limitations on competitive negotiation, prohibits accepting contingent fees, prohibits the payment of certain commissions, and establishes other prohibitions to which persons who are deemed to be "practicing public accountancy" must adhere. some of these prohibitions are contrary to normal, ethical practice of other professions, i.e., acceptance of contingent fees by lawyers. If the rule remains intact, the Board and DPR under Chapters 473 and 455 *F.S.* have the potential of breaching the confidentiality of CPA-attorneys, legal clients' files. See, Section 473.316(5) and 473.318 *F.S.* Since attorneys are exclusively overseen by the Florida Supreme Court, the rule potentially violates the doctrine of "separation of powers" among the three branches of state government.

39. Therefore, the definitional rule creates a wedge whereby the Board may insinuate its discipline into other professions and confuses dually licensed CPAs from knowing how they may behave in each profession without running afoul of discipline in the other. In application with other rules, the "holding out" rule sets confusing and varying standards for agency decisions involving attorneys, bankers, CPAs employed by private corporate employers, and CPAs with their own financial consultant firms.

40. The Board of Accountancy has issued a series of letter opinions based on the "holding out rule" or based on that rule read in conjunction with Rule 21A-21.009 *F.A.C.*, the "other business activity rule," which indicate

that a Florida CPA who does not "hold out" to the public as a CPA and who is not associated with financial statements is permitted by the Board to engage in other business activities without complying with the provisions of Chapter 473 *F.S.* that is, not being subject to UPR discipline, because the Board does not view that A in those activities as "practicing public accountancy." Also, the Board of Accountancy has issued a series of opinions to the effect that, by virtue of Section 473.302(4) *F.S.* and the "holding out rule," a CPA who "holds out" (publicizes his or her status as a CPA) is automatically, by definition, "practicing public accounting," regardless of what actual business activity he is performing. These opinions also indirectly insinuate the Board of Accountancy into many other professions, including the practice of law, which the Board has no statutory mandate to regulate pursuant to Section 473.301 *F.S.* The plethora of opinions issued by the Board dramatize the confusion experienced by CPAs who have sought to have the Board interpret the rule in question on a case-by-case basis.

41. Testimony of the Chairman of the Board was offered to establish that absent the challenged rule, the Board cannot reasonably regulate negligence in the profession and that absent the rule, only fraud could be prosecuted by the Board. He testified that, in his opinion, the challenged rule means that a CPA performing tax services for a client is not doing public accounting" if "CPA" is not appended after the CPA's name in advertising and that *that* CPA cannot be disciplined by the Board for negligence, any more that he could be disciplined if he were a non-CPA doing tax services. The Chairman further opined that a CPA doing tax services is doing

public accounting only *if* he appends CPA after his name, and in that instance, the Board can and will discipline *that* CPA for negligence, should he commit any. Further, the Chairman indicated that if Rules 21CPA-21.009, 21A-20.011, and 21A-20.012 *F.A.C.* were not simultaneously in place, the actively licensed CPA who places CPA after is name could not be disciplined by the Board for negligence, but only for fraud. Precisely how this would occur was not made clear, but upon the foregoing, together with the Board opinions admitted in evidence, it is concluded that the Board has utilized what purports to be purely a definitional rule to establish disciplinary jurisdiction and that in certain instances the rule puts DPR in the precarious position of *only* being able to prosecute CPAs with "CPA" appended after their names, but not CPAs who perform the same services and who do *not* append "CPA" after their names. Such a result is nonsensical.

42. The Board does not seriously suggest that if Rule 21A-20.012 *F.A.C.* is invalidated, Rule 21A-20.011 would provide a blanket exclusion from all provisions of Chapter 473 *F.S.* for CPAs "using" or "assuming" or "publicizing" their status. At a minimum, such CPAs would have to maintain their credential as would any other CPA for good character, payment of fees, and recertification for competency based on continuing education.

43. What has actually occurred here is that the Board has consciously utilized Rules 21A-20.011 and 21A-20.012 *F.A.C.* so as to not enforce Section 473.302(4)(a) as written and so as to selectively enforce only Section 473.302(4)(b) *F.S.* Then, by its selective enforcement of Rule 21A-20.012, the Board has gone a

step further. The Board has "interpreted" Section 473.302(4)(b) to include within Board jurisdiction not those functions, activities, or skills a CPA practices or holds out to the public for a fee as constituting "practicing public accountancy" but has made the definition of "practicing public accountancy" encompass *any* disclosure of CPA status or skill attainment, regardless of the disclosure's truth and regardless of whether or not the CPA is utilizing any of the functions, activities, or skills of a CPA. By so doing, the Board has exceeded its statutory mandate and legislative purpose as set forth in Section 473.301 *F.S.*

44. On its face, Rule 21A-20.012 *F.A.C.* consists of three sentences, which, in relationship to each other, are inconsistent and contradictory. Specifically, sentence ONE seems to be based on the overall representation made by a CPA to "uninformed persons." It simultaneously presumes fraud in the communication of what otherwise would be truthful, passive information.[3] Sentence THREE subjects the CPA to discipline, absent any fraud and totally without consideration to the impression formed by "uninformed persons" from the use of the CPA designation in any manner other than display of the certificate.[4]

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[3] The first sentence defines "holding out" as, " . . . publicizing that the licensee is a certified public accountant when providing, or offering to provide services or products to the public, in such a manner that an uninformed person may not be able to differentiate whether or not the licensee may also be in the practice of public accounting."

[4] "All other publication [besides display of the certificate and license] of the fact that a licensee is a CPA constitutes holding oneself out." [Bracketed material added for clarification.]

45. Because there are two incompatible definitions in the challenged rule as now drafted, the Board is at liberty to selectively enforce the statute. One CPA could be prosecuted for simply disclosure of credential status or neutral biographical information (Ibanez). Another CPA might be prosecuted only after examination of the totality of his circumstances to determine if the circumstances mislead "uninformed persons" into believing he abides by all the regulations promulgated under Chapter 473 *F.S.*, and still another CPA would never be prosecuted unless he performs the attest function. This is nonsensical and clearly unfair.

CONCLUSIONS OF LAW

1. The Division of Administrative Hearings has jurisdiction of the parties and subject matter of this cause. See, Section 120.56 *F.S.*

2. Upon the foregoing findings of fact it is clear that Petitioner, Respondent, and all intervenors have standing in this proceeding.

3. Petitioner bears the burden to go forward and prove that Rule 21A-20.012 *F.A.C.* is an invalid exercise of delegated legislative authority. *Agrico Chemical Co. v. State Department of Environmental Regulation*, 364 So.2d 759 (Fla. 1st DCA 1978), *cert. denied*, 376 So.2d 74 (1979). It is a stringent burden of proof. *Adams Smith Enterprises v. Florida Department of Environmental Regulation*, 553 So.2d 1260 (Fla. 1st DCA 1980).

4. Petitioners asserted that the economic impact statement (EIS) prepared pursuant to Section 120.54(2)(b) *F.S.* prior to adoption of Rule 21A-20.012 *F.A.C.* was inadequate and thus the Board of Accountancy failed to comply with appropriate rulemaking proceedings. They further asserted that such failure, if not specifically fatal, is indicative of other flaws in the rule. Since the rule in question was effective in September 1984, an attack on the EIS is foreclosed at this late date. See, Section 120.54(2)(d) *F.S.* and *Herring v. Department of Administration*, 9 FALR 5210 (1987).

5. Pursuant to Section 473.304 *F.S.*, the Board of Accountancy has authority to adopt all rules necessary to administer Chapter 473 *F.S.*

6. Where the empowering provision of a statute states simply that an agency may "make such rules and regulations as may be necessary to carry out the provisions of this act," the validity of the regulations promulgated thereunder will be sustained as long as they are reasonably related to the purpose of the enabling legislation and are not arbitrary or capricious. See, *General Telephone Co. of Florida v. Florida Public Service Commission*, 446 So.2d 1063, 1067 (Fla. 1984).

7. Citing *Peninsular Supply Co. v. C.B. Day Realty of Florida*, 423 So.2d 500 (Fla. 3d D.C.A. 1982) and *State ex rel, Szabo Food Services Inc., of N.C. v. Dickson*, 286 So.2d 529 (Fla. 1973), Respondents asserted that the Legislature's reenactment of Chapter 473 *F.S.* after "sunset review" subsequent to the effective date of the challenged rule (see, Chapter 85-9 *Laws of Florida*) and amendment of Section 473.302(4) *F.S.* (see, Chapter 89-87 *Laws of Florida*)

without modifying the "holding out" language therein creates a conclusive presumption that the challenged rule is a valid exercise of delegated authority. The first case is clearly distinguishable and should be rejected. *Peninsular Supply Co.* stands for the proposition that the legislature's enactment of a new statutory right cannot implicitly abrogate a common law right firmly entrenched by court decisions. The facts enunciated in *Szabo* are more closely on point, but the legal presumption is not conclusive. That case hinges in part on presumptions peculiarly applicable to tax cases, and therein the prior administrative interpretations were considered merely "persuasive unless erroneous or clearly unauthorized." Therefore, even if *Szabo* is appropriate for the premise for which it is cited, it permits the presumption to be rebutted, where, as here, the result of the rule's application by the Board has led to nonsensical results. The Legislature cannot be presumed to have intended an absurd result. See, by analogy, *State v. Safer,* 368 So.2d 620 (Fla. 1st DCA 1979); *State Farm Mut. Auto. Ins. Co. v. O'Kelley,* 349 So.2d 717 (Fla. 1st DCA 1977).

8. Respondents also contended that the challenged rule may not be held invalid because it is definitional in nature and contains no affirmative or negative requirements. However, where a definitional rule enacted for purposes of exemption enlarges, modifies, or contravenes specific provisions of the law implemented, it may be declared invalid. See, Section 120.52(8)(c) *F.S.* and *Department of Natural Resources v. Wingfield Development Co.,* 581 So.2d 193 (Fla. 1st DCA 1991). Here, the rule's application does that and as applied with other rules also has invaded the practice of other professions, rendering the

rule overbroad and exceeding the Board's authority. See, Section 120.52(8)(b) *F.S.*

9. The purpose of Chapter 473 *F.S.* is set forth in 473.301 *F.S.*, which reads as follows:

> 473.301 Purposes – The legislature recognizes that there is a public need for independent and objective public accountants and that it is necessary *to regulate the practice of public accounting* to assure the minimum competence of practitioners and the accuracy of audit statements upon which the public relies and to protect the public from dishonest practitioners and, therefore, deems it necessary in the interest of public welfare *to regulate the practice of public accountancy* in this state. [*Emphasis supplied*]

10. Under Section 120.52(8)(d) *F.S.*, a rule may also constitute an invalid exercise of delegated legislative authority if it is vague and fails to establish adequate standards for decision making. A rule is vague or fails to establish adequate standards for agency decisions if persons of common intelligence must necessarily guess at its meaning and differ as to its application. See *State v. Cumming,* 365 So.2d 153 (Fla. 1978).

11. The first sentence of Rule 21A-20.012 *F.A.C.* defines "holding out" as follows:

> "Holding himself or itself out" as used in Section 473.302(4), *F.S.*, is defined as publicizing that the licensee is a certified public accountant when providing, or offering to provide services or products to the public, *in such a manner that an uninformed person may not be able to differentiate whether or not the licensee may also be in the practice of public accounting.* [*Emphasis supplied*]

This first sentence suggests that whether or not a practitioner is "holding out" is based on the overall representation made by the CPA, as interpreted by an "uninformed person." The terms "uninformed person," and "publicizing" are not defined and are subject to a number of interpretations. This sentence, unmodified by sentences two and three, also presumes that, whatever "publicizing" is, it must be misleading.

12. In sharp contract to the first sentence of the rule, the remainder of Rule 21A-20.012 provides:

> The display of the CPA certificate and license issued by the Department of Professional Regulation shall not constitute holding out under the terms of this rule. *all other publication of the fact that a licensee is a CPA constitutes holding oneself out.* [*Emphasis supplies*]

As the term "holding out" is defined in the second and third sentences, a CPA is "holding out," and therefore subject to all the requirements of Chapter 473 *F.S.*, simply by truthfully using the "CPA" designation in any manner other than display of the CPA certificate. Under the definition contained in sentences two and three, as contrasted with the definition under the first sentence of the rule, no consideration is given to the impression made upon uninformed persons by the practitioner as to whether or not the practitioner is actually practicing public accounting and therefore is subject to the Board's jurisdiction. The term "publication" is likewise undefined here.

13. Whether or not a practitioner is "holding out" is dependent upon which portion of the rule is being relied upon, the first sentence or the following two. Also, as clearly demonstrated, Rule 21A-20.01, *F.A.C.* is, on its

face, both vague and internally contradictory and is, therefore, subject to widely differing interpretations, not the least of which is what jurisdiction over fraud *versus* jurisdiction over negligence resides in the Board. Although at formal hearing the Board and FICPA asserted that this rule is necessary to regulate negligent (as opposed to fraudulent) activities of licensed CPAs, the purported purpose of the "holding out" rule was to inform licensed CPAs as to what constitutes "holding out," and in conjunction with Rules 21A-20.009 [sic] and 21A-20.011 *F.A.C.*, to give CPAs the opportunity to engage in practices other than public accounting without being subject to the jurisdiction of the Board and the requirements of Chapter 473 *F.S.* Except for the blanket assertion that the public assumes the CPA designation, however used, symbolizes oversight by the licensing authority, no explanation was offered to justify the apparent contradiction between the intent to allow some CPAs to fall outside the Board's jurisdiction and the desire, now, to ensure that the Board maintains jurisdiction for disciplinary purposes over CPAs dually licensed in other professions.

14. The Board and FICPA's position is that the rule is justified and reasonable since any display or publication of a licensee's CPA credential, other than the display of the CPA certificate and license on an inner office wall, would deceive members of the public into believing that the individual is abiding by all regulations of the Board. The Board is also concerned because it will have difficulty discerning which CPAs may be prosecuted unless every benefit to a CPA from disclosing his or her CPA

status, however slight that benefit is, concomitantly subjects the disclosing CPA to all aspects of Board regulation. However, the Petitioner has shown that passive dissemination of factual information is not necessarily detrimental to the public and is not contrary to the expressed purpose of the Act. Indeed, Section 473.301 *F.S.* states a threefold purpose for Board regulation of the "practice of public accounting": (1) to assure minimum competence; (2) to assure accuracy of audit statements upon which the public relies; and (3) to protect the public from dishonest practitioners. None of these purposes seems served by the rule as presently drafted.

15. The rule at issue seems intended to prohibit publication of a licensee's CPA status when that publication would confuse or mislead consumers as to whether the licensee is performing public accounting services or some other type of professional service at a particular time. The rule does not accomplish that intent, but rather utterly confuses a licensee as to when an activity, legitimate on its face, is proscribed and subject to disciplinary prosecution.

16. The Board seeks to impose disciplinary oversight to protect the public against both fraud and negligence, but one statutory and regulatory scheme ranges far beyond that legitimate purpose, contrary to the expressed legislative intent for the Board. The rule is overbroad, vague, contradictory, and ambiguous.

17. The Legislature's avowed purpose for the Board is to "regulate the practice of public accounting." The circuitous nature of the challenged rules has, through

other rules, permitted the Board to insinuate its regulation into professions other than accounting, regardless of the nature of those professions work or other business activities, simply because the licensees are simultaneously licensed as CPAs and have truthfully indicated that they hold CPA licenses. However, those other rules have not been challenged herein and because the foregoing analysis of the challenged rule's other failings (overbroad, facially vague, internally contradictory, and ambiguous) resolves the issue that the challenged rule is not valid because it is arbitrary and capricious (see, Section 120.52(8)(e) *F.S.*), it is not necessary to further address those ancillary issues.

18. Although the rule's challengers have also raised issues including but not limited to the rule's conflict with federal and state constitutional safeguards of free speech and against restraint of trade, the undersigned is without jurisdiction, power, or authority to resolve those issues and will not attempt to do so. Cf, *Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund*, 427 So.2d 153 (Fla. 1st DCA 1982).

Upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Rule 21A-20.012 *F.A.C.* constitutes an invalid exercise of delegated legislative authority.

DONE and ORDERED this 15th day of January 1992 at Tallahassee, Florida.

ELLA JANE P. DAVIS,
Hearing Officer
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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

STATE OF FLORIDA, DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF ACCOUNTANCY, Petitioner, vs. SILVIA IBANEZ, Respondent.	)	CASE NO. 91-4100

RECOMMENDED ORDER

Upon due notice, this cause came on for formal hearing on August 27, 1991, in Tallahassee, Florida, before Ella Jane P. Davis, a duly assigned Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

FOR RESPONDENT: Tobi C. Pam, Esquire
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FOR RESPONDENT SILVIA S. IBANEZ: Silvia S. Ibanez, Esquire
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and
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STATEMENT OF THE ISSUES

(1) Count I of the Amended Administrative Complaint as modified by the August 22, 1991 Order on Reconsideration alleges Respondent Certified Public Accountant (CPA) practiced public accounting in an unlicensed firm by appending the CPA designation after her name in the telephone book and on business cards in violation of Sections 473.323(1)(a), (g), and (h) *F.S.* and Rule 21A-20.012 *F.A.C.*

(2) Count II of the Amended Administrative Complaint as modified by the August 22, 1991 Order on Reconsideration alleges that Respondent CPA violated Sections 473.323(1), (g), and (h) and Rule 21A-24.001(1)(g) *F.A.C.* by appending the certified financial planner (CFP) designation along with the CPA designation after her name in the telephone book and on business cards, in that the CFP designation allegedly is an unapproved specialty of accountancy.

(3) Count III of the Amended Administrative Complaint as modified by the August 22, 1991 Order on Reconsideration alleges that Respondent CPA practiced public accounting by holding herself out as a CPA by appending the CPA designation after her name in the telephone book and on her business cards, implying that she abides by the provisions of Chapter 473 *F.S*, and is thereby in violation of Sections 473.323(1)(f), (g), and (h) *F.S.* and Rule 21A-24.001 *F.A.C.* [no specific subsections cited].

PRELIMINARY STATEMENT

Silvia S. Ibanez (Ibanez) filed a petition on May 10, 1991 challenging the validity of Rule 21A-20.012 *F.A.C.*, one of the rules upon which this instant disciplinary action by the Department of Professional Regulation (DPR) against Respondent Ibanez is based. That case was styled *Ibanez et al. v. Board of Accountancy et al.*, DOAH Case No. 91-3336R. On June 13, 1991, DPR filed this instant disciplinary action against Ibanez. The initial administrative complaint was triggered by anonymous notification to DPR of the contents of Ibanez' telephone listings and business card. The two cases were consolidated.

DPR filed an amended administrative complaint on July 30, 1991, which amendments were opposed by motion. In consideration of those motions, the amended administrative complaint was modified by the Order of Reconsideration entered August 22, 1991.

After bifurcation and formal hearing in the rule challenge, the instant disciplinary case was heard in formal hearing on August 27, 1991.

DPR had three exhibits admitted in evidence and presented the oral testimony of Louis Dooner, Elise Rice, and Martha Willis.

Ibanez had admitted twelve exhibits and presented the oral testimony of Robert Goss. Respondent Ibanez also testified on her own behalf.

A transcript was provided.

The parties also stipulated that the testimony and exhibits from the rule challenge, *Ibanez et al. v. Board of*

Accountancy et al., DOAH Case No. 91-3336R, would be copied, certified, and adopted into the record of the instant case. That has been accomplished.

All timely filed proposed findings of fact have been considered and ruled on in the appendix to this recommended order, pursuant to Section 120.59(2) *F.S.*

This recommended order relates solely to the instant disciplinary action.

FINDINGS OF FACT

1. Respondent Silvia S. Ibanez is a practicing attorney, a member of the Florida Bar, and holds active Florida CPA License No. 10842, currently in good standing. She is also a Registered Investment Advisor with the Florida Division of Securities and a certified financial planner (CFP). At all times material, she has been actively certified as a CFP in good standing with the International Board of Standards and Practice for Certified Financial Planners (IBCFP).

2. The IBCFP is a corporation. "CFP" and "certified financial planner" are registered trademarks. The IBCFP has no governmental affiliations within the state of Florida. The Florida Board of Accountancy has no involvement in the CFP accrediting process and no proprietary interest over the CFP mark.

3. As a licensee with the federal Securities and Exchange Commission, Ibanez is required to, and does, disclose the fact that she is a CPA.

4. Ibanez' CPA certificate (like all Florida CPA certificates) authorizes her to display her CPA credentials. The CPA certificate represents that the recipient,

> . . . has passed all examinations and has met all other requirements prescribed by law and by rule of this board for certification as an expert public accountant, and *is therefore entitled to append the letters CPA after this registrant's name to evidence registration by this board as a Certified Public Accountant.* [*Emphasis supplied*]

5. The Board of Accountancy's only classifications of CPA licenses/licensees are "active" or "inactive." "Active" and "inactive" refer to the status of the CPA license and do not refer to or imply that the licensee is actively practicing public accounting. One can be an actively licensed CPA and not be practicing public accounting.

6. The Board of Accountancy issued a letter opinion to Ibanez that a CPA who offers financial planning services for a fee but who does not hold out as a CPA or become associated with financial statements would not be practicing public accounting.

7. Ibanez is listed in the yellow pages under the heading, "Attorneys," as "Ibanez, Silvia, S., CPA, CFP." Respondent also is listed in the white pages as "Ibanez, Silvia S., CPA CFP atty." On their face, there is nothing false or fraudulent about these listings. As an attorney, Petitioner also places "CPA" after her name on her business cards and on her letterhead. The Respondent's business card states "Sylvia [sic] Safille Ibanez, JD, CPA, CFP." DPR contends that *because* Petitioner "holds out" to the public as a CPA, uses accounting skills, and provides

one or more types of management, advisory or consulting services, she is currently "practicing public accounting."

8. Ibanez is not listed in the yellow pages under "accountants," "accountants, certified," or "CPAs."

9. Neither the CFP nor CPA credential is part of the firm name, "Silvia S. Ibanez, P.A. – Law Offices," which also appears on Ibanez' business card. Ibanez' telephone directory listings and card at issue show the CPA and CFP credentials strictly appended to Respondent's individual name.

10. Louis Dooner, accepted as an expert certified public accountant, testified that the Respondent is involved in the practice of public accounting because by merely appending the CPA designation after her name on her business cards, she is telling the public that she is offering to perform services that CPAs perform.

11. Respondent Ibanez currently operates as a sole practitioner of law employed by the law firm of "Silvia S. Ibanez, P.A." As such, she provides specialized legal services for her clients not provided by CPAs. As part of her current, normal professional activities as an attorney, she provides all types of tax services to her clients, including tax opinion work, representation before the Internal Revenue Service, and evaluation of the tax consequences of certain transactions. She also performs financial counselling and planning for her clients. In doing so, she utilizes both her legal education, training, and experience and her education, training, and experience as a CPA. Prior to admission to the Florida Bar, Ibanez was employed by two CPA firms where she did substantially similar work, plus audits.

12. It is conceded by the parties that it is possible to practice law and public accounting in the same business activity and that many activities conducted by professionals and nonprofessionals other than by CPAs and other than by attorneys are identical to activities performed by CPAs engaged in public accounting. For instance, anyone can legally prepare a tax return. Bookkeepers and free-lance tax assistors of all sorts are unregulated in any way.

13. Truthful use, communication, or disclosure of the CPA credential by an actively licensed CPA does not *per se* constitute false, misleading, or deceptive advertising. The evidence does not support a finding that withholding truthful disclosure that one has earned the CPA credential benefits the public welfare or effects the purposes of the enabling legislation, or indeed, how such nondisclosure could promote them, particularly since it has been shown that persons of considerably lesser competency and achievement levels in the discipline of accounting may legally offer to the public almost all the services provided by CPAs.

14. The use of the term "CPA" implies a specific competency to the public. The fact that Ibanez is a CPA is valuable to her legal clients. CPA status is a valuable property right to each CPA, and the ability of a practicing attorney to publicize the fact that s/he holds an active CPA license is a valuable asset to that individual.

15. The only activity among public accounting activities that is a unique activity of CPAs is the "attest" function. See, Section 473.322(1)(c) *F.S.* There is no evidence that Respondent Ibanez attests as a CPA in the

course of her law practice or that she personally performs audits.

16. Ibanez testified credibly that her intent in appending the CPA and CFP credentials solely to her own name is to indicate that she is, in her own right, individually licensed as a CPA and CFP.

17. Respondent Ibanez has clearly marked her office premises with all the indicia of a law office, including two signs posted outside the building itself. One sign specifies that the building constitutes "law offices," that "Silvia S. Ibanez, P.A." is located there, and that Ibanez is an "attorney at law," with no reference to her CPA or CFP credentials. Another sign specifies, "law offices," without any reference to her CPA or CFP credentials. A potential client must pass these two signs just to enter the building that houses Ibanez' law office. Once in the building, a potential client also must be admitted by a secretary to Ibanez' inner office.

18. Ibanez has consistently required her secretary to screen all telephone calls and potential clients who enter the office to be certain that persons seeking out Ibanez will be fully informed that Ibanez is not offering strictly accounting services and that she is practicing law. Ibanez also personally makes that information clear to individuals at each initial office consultation and consistently follows up office consultations at which her legal employment has been negotiated with letters and/or employment contracts which set forth the parameters of the legal services she has agreed to perform for clients.

19. Elise Rice is an employee of Petitioner Department of Professional Regulation who has earned a vocational school accounting diploma. She is not a CPA, nor is she an attorney. Ms. Rice testified that she, personally, drew the conclusion from looking at Respondent's business card that the Respondent was a CPA, but that she did not know what CFP or JD signified and therefore she would not assume from the card that Ibanez was a lawyer or a certified financial planner. Clearly, the designation "CFP" did not suggest to Ms. Rice that Ibanez was advertising either a specialty or particular competence in public accounting.

20. Ms. Rice further stated that, despite Ibanez' business card's clear use of the term "law offices," she would continue to believe that Ibanez was doing both CPA work and legal work of "law offices." Ms. Rice further stated that even if she telephoned ahead and spoke to a secretary who clearly indicated that Ibanez was a CPA but was working as a lawyer, she would persist in believing that Ibanez was doing both CPA work and legal work out of "law offices." Ms. Rice also testified that if she arrived at Ibanez' office building and was confronted by the sign posted there which clearly indicates Ibanez is an attorney at law and the two signs that clearly state that the building houses only "law offices," she would then believe that she had come to the wrong place to find Ibanez the CPA. However, Ms. Rice conceded that, under the latter circumstances, the premises were, indeed, law offices. Ms. Rice's personal view that Ibanez must be acting as a CPA in the face of significant information to the contrary is not persuasive that the average layman would be misled by Ibanez' business

card and telephone listings in the face of all her other disclosures.

21. One who has initially consulted the yellow pages of the telephone directory under the heading "attorneys" would most logically infer from Ibanez' yellow pages listing that Ibanez is a practicing attorney who is dually licensed as a CPA and who possesses a CPA's education, training, experience, and skills and that Ibanez is offering to act as a lawyer capable of applying her additional education, training, experience, and skills as a CPA and CFP.

22. The inferences that the average viewer might draw from Ibanez' white pages telephone listing and her business card are more blurred, but Ibanez demonstrated, and it is conceded by both parties, that an individual may have the opportunity to disabuse members of the public that s/he is engaged in the activity of the practice of public accounting or that s/he is offering all the services normally associated with a CPA, as opposed to law or some other profession, at least where there is direct contact by letter or telephone.

23. It may be reasonable that at least until making direct contact with Ibanez or her office staff, the average viewer of either the telephone listings or the card would assume that, as a CPA, Ibanez is subject to disciplinary oversight by the licensing authority for accounting functions only and that she abides by all Board of Accountancy regulations while doing accounting. However, prior to any meaningful employment, Ibanez exercises reasonable care to disabuse the average viewer of that belief.

24. Since 1982, the Board has consistently issued letter opinions on an individual basis to the effect that the designation "certified financial planner" is an accountancy specialization which has not been approved by the Board and further holding that "CFP" could not be displayed by CPA licensees on stationery or in yellow pages listings in conjunction with the CPA designation. The Executive Director of the Florida Board of Accountancy did not know how "certified financial planner" came to be viewed as a specialty designation of certified public accounting, and the letter opinions do not set forth the Board's rationale for considering it as a specialty. The Board has adopted no rule to that effect. Further, in this proceeding, the agency has not proven any rationale for the policy set forth in the Board opinions.

25. The agency presented no evidence by way of anecdotal experience, professional studies, or accumulated data to show that licensed CPAs or certified CFPs have ever mislead [sic] members of the public purely by displaying their credentials in the manner Ibanez has done here.

26. DPR knows of no complaint and has never received any complaint from a member of the public regarding Ibanez' professional activities or advertising. Nor is there any evidence that any member of the public has ever been confused about whether or not Ibanez was practicing accounting or law or financial planning or that any member of the public was mislead into hiring Ibanez under the impression that she would be acting as a CPA solely and not as an attorney, or that she would be performing audits or performing the attesting function of a CPA.

27. Upon the scenario established in the case *sub judice*, Ibanez is not guilty of any fraudulent advertising so as to mislead the public to the effect that she abides by all regulations of the Board of Accountancy.

CONCLUSION OF LAW

1. The Division of Administrative Hearings has jurisdiction of the parties and subject matter of this cause. See, Section 120.57(1) *F.S.*

2. Respondent is charged in the three-count amended administrative complaint with several violations of Sections 473.323(1)(a), (f), (g), and (h) and of Rules 21A-20.012 and 21A-24.001 *F.A.C.* solely because she is alleged to be "practicing public accounting or accountancy." The counts overlap in some respects as discussed *infra*.

3. Section 473.302(4) *F.S.* provides, in pertinent part:

> (4) "Practice of," "practicing public accountancy," or "public accounting accounting" means:
>
> (a) Offering to perform or performing for the public one or more types of services involving the use of accounting skills, or one or more types of management advisory consulting services, by a certified public accountant, or firm of certified public accountants, of this state, including the performance of such services in the employ of another person; or
>
> (b) Offering to perform or performing for the public one or more types of services involving the use of accounting skills or one or more types of management advisory or consulting

> services, by any other person holding himself or itself out as a certified public accountant or firm of certified public accountants, including the performance of such services by a certified public accountant in the employ of a person so holding himself or itself out.
>
> However, these terms shall not include services provided by the American Institute of Certified Public Accountants or the Florida Institute of Certified Public Accountants, or any full service association of certified public accounting firms whose plans of administration have been approved by the board, to their members or services performed by these entities in reviewing the services provided to the public by members of these entities.

4. Section 473.323(1) *F.S.* provides, in pertinent part:

> 473.323 Disciplinary proceedings.
>
> (1) The following acts constitute grounds for which the disciplinary actions in subsection (3) may be taken:
>
> (a) Violation of any provisions of s. 473.317, s. 455.227(1), or any other provisions of this act;
>
> * * *
>
> (f) Advertising goods or services in a manner which is fraudulent, false, deceptive, or misleading in form or content;
>
> (g) Upon proof that the licensee is guilty of fraud or deceit, or of negligence, incompetency, or misconduct, in the practice of public accounting;

(h) Violation of any rule adopted pursuant to this act or chapter 455;

* * *

5. Rule 21A-20.011 *F.A.C.* defines "practice of," or "practicing public accountancy" as follows:

> 21A-20.011 Practice of, or Practicing Public Accountancy
>
> "Practice of, or practicing public accountancy" as defined by Section 473.302(4), F.S., shall exclude any of the following:
>
> (1) Services rendered by a licensee as an employee of a governmental unit or an employee rendering accounting services only to his employer as long as that employer is not required to be licensed under F.S. 473, or
>
> (2) Activities of licensees who do not hold themselves out as CPAs and who are not associated with financial statements, or
>
> (3) Activities of licensees who do not hold themselves out as certified public accountants.

6. Rule 21A-20.012 *F.A.C.* attempted to define "holding out," as follows:

> 21A-20.012 Holding Out
>
> "Holding himself or itself out" as used in F.S. 473.302(4) is defined as publicizing that the licensee is a certified public accountant when providing, or offering to provide services or products to the public, in such manner that an uninformed person may not be able to differentiate whether or not the licensee may also be in the practice of public accounting. The display of the CPA certificate and license issued by the Department of Professional Regulation shall not constitute holding out under the terms of this rule. All other publication of the fact that a licensee is a CPA constitutes holding oneself out.

However, Rule 21A-20.012 *F.A.C.* has been ruled invalid in a Final order entered simultaneously herewith in *Ibanez et al. v. DPR, Board of Accountancy,* DOAH Case No. 91-3336R.

7. Rule 21A-24.001 *F.A.C.* is a rule of many subparts defining and precluding certain forms of advertising by CPAs.

8. In their prehearing stipulation, the parties stipulated, as fact, that the Board of Accountancy will not deem Ibanez' activities, including those of an accounting nature, to be public accounting activities if any of the three exclusions under Rule 21A-20.011 *F.A.C.* apply. This stipulation is more in the nature of a stipulation of law than one of fact and has been treated as such. The parties also stipulated as matters of law that the exclusion in Section (3) of Rule 21A-20.011 *F.A.C.* is wholly dependent on the definition of "holding out" and that the credential "CFP" is not a "self-designation" as used in Rule 21A-24.001(1)(g) *F.A.C.*

9. DPR asserted that Ibanez is engaged in "practicing public accounting" as set forth in one or both of the definitions of that term contained in subparagraphs (a) and (b) of Section 473.302(4) *F.S.* Ibanez countered to the effect that she was exempt from those statutory definitions on the basis of one or more of three exclusions to

the term "public accounting," which are set forth in Sections (1), (2), and (3) of Rule 21A-20.011 *F.A.C.*, and therefore, she could not be held to have violated any portion of Chapter 473 *F.S.* More specifically, Ibanez urged that because she is working as an attorney within a P.A. (which she asserted is an employer not required to be licensed under Chapter 473 *F.S.*), she falls under exception 21A-20.011(1) *F.A.C.*

10. First, Rule 21A-20.011 *F.A.C.* cannot be fairly interpreted or legally construed as a blanket exemption from the applicability of *all* Chapter 473 *F.S.* provisions. Minimally, Ibanez remains subject to the Chapter's payment of fees, continuing education, and good moral character requirements. Secondly, Ibanez' argument with regard to Section (1) of that rule is not persuasive, since she renders personalized services in her own right directly to the public, regardless of certain liability and tax protections afforded her personally by the "P.A." status of her law firm.

11. Whether or not Ibanez comes within the remaining exceptions set forth in Sections 21A-20.011 (2) and (3) *F.A.C.* depends upon how the term "holding out" as used therein is interpreted. The definition of "holding out" is not wholly tied to the invalidated rule, 21A-20.012 *F.A.C.* Absent that rule, interpretation of the statutory term "holding out" is appropriate. Normally, the clear common meaning of the statutory term would be applied. Unfortunately, in this proceeding, statutory interpretation is still rendered "circular" due to Rule 21A-20.011(2) and (3) *F.A.C.*

12. The definition of "practicing public accounting" contained in Section 473.302(4)(a) *F.S.* encompasses Ibanez, who is a CPA licensee. That definition covers "offering to perform or performing for the public one or more types of services involving the use of accounting skills, or one or more types of management advisory consulting services, *by a certified public accountant, . . .* " regardless of whether or not the CPA "holds out." [Emphasis supplied] However, Sections (2) and (3) of Rule 21A-20.011 *F.A.C.* address Section (a) as well as (b) of 473.302(4) *F.S.* The rule provides that, " *'Practice of, practicing public accountancy' as defined by Section 473.302(4) F.S. shall exclude* any of the following . . . (2) activities of licensees who do not hold themselves out as CPAs and who are not associated with financial statements, or (3) activities of licensees who do not hold themselves out as certified public accountants." [Emphasis supplied] It is fairly debatable whether Rule 21A-20.011(2) and (3) *F.A.C.* legitimately interpret the legislative intent of Section 473.302 (4)(a).[1] It is also fairly debatable whether or not Rule 21A-20.011 *F.A.C.* exceeds the Board's statutory mandate and insinuates the Board's discipline into other professions. However, no petition to determine the validity of Rule 21A-20.011 *F.A.C.* has been filed. Therefore, Rule 21A-20.011 *F.A.C.* continues to be entitled to the great weight normally afforded existing agency rules.

---

[1] It seems abundantly clear that absent the exceptions of Rule 21A-20.011 *F.A.C.*, Section 473.302(4)(a) *F.S.* would render actively licensed CPA Ibanez subject to Board discipline whether she "holds out" or not, and it is only section 473.302(4)(b) which includes the term "holding out."

13. Great weight must be afforded to the agency's interpretation of the statutes it administers. It is recognized that DPR and the Board have consistently declined to prosecute any CPA offering all the services Ibanez does unless that CPA was also "holding out" in some manner. It is further recognized that in the instant case, DPR has stipulated that if any of the three exemptions in Rule 21A-20.011 *F.A.C.* applies, then Ibanez' activities, including those of an accounting nature, do not constitute public accounting activities. Applying the three foregoing principles, it ultimately must be concluded that Ibanez' activities, even though she is a licensed CPA, do not constitute "practicing public accounting" *unless* she is one of those "holding themselves out as certified public accountants."

14. Ibanez interprets financial statements, but she is not "associated" with them in the sense that term is normally applied to CPAs. She is not attesting or performing audits. She is not performing any activity that *requires* licensure by the Board of Accountancy. The Board admittedly could not discipline a non-CPA for performing the accounting activities Ibanez is performing.[2] Some of the activities Ibanez performs are the same as activities performed by CPAs. Many are not. As an attorney, she also performs specialized services for her clients that are

[2] Section 473.322(1)(c) *F.S.*, which reserves the "attest" function strictly to CPAs, also specifies that, "This subsection shall not prevent the performance by persons other than certified public accountants of other services involving the use of accounting skills, including the preparation of tax returns and the preparation of financial statements without expression of opinion thereon.

not performed by other CPAs. Her telephone listings and business card do not "hold out" that she will perform any activity exclusive to public accounting or that she will perform work *as* a CPA. All indicia of her office premises, all of her disclaimers, and the majority of actual activities she performs support a conclusion that she is not "holding herself out as a certified public accountant." It is therefore concluded that she is not "holding herself out as a certified public accountant" practicing public accountancy so as to be subject to discipline for the violations charged in the instant amended administrative complaint. Nor is she guilty of any fraudulent advertising so as to mislead the public to the effect that she abides by all the regulations of the Board of Accountancy. Moreover, if the purpose of the police power here exercised is to protect the public, it is difficult to see how the public is harmed by Ibanez' advertising or services, which services she provides only after reasonable – indeed elaborate – efforts at avoiding any misapprehension of her CPA status by those employing her.

15. In making the determination that Ibanez is not "holding herself out as a CPA," the undersigned has weighed both the permissions granted to the Respondent by the Board of Accountancy in its certificate of licensure and the permissions granted to the Respondent by the Legislature under Section 473.322 *F.S.*[3] The undersigned

[3] Section 473.322 *F.S.* permits a CPA to assume and use his or her validly earned credential and title and to put it in words, letters, abbreviations, signs, cards and devices so long as s/he is actively licensed. The credential provides much the same. See, Finding of Fact 4, *supra*.

also has considered the thrust of the opinions in *Cenac v. Florida State Board of Accountancy*, 399 So. 2d 1013 (Fla. 1st DCA 1981) and *Florida Accountants Assoc. v. Dandelake*, 98 So. 2d 323 (Fla. 1957). *Dandelake* considered the occupational rights of accountants who are not certified *viz a viz* the Board's regulatory powers. *Cenac* considered the situation of an inactively licensed CPA performing many but not all the services normally considered "practicing public accountancy."

16. Although this is a case of first impression with regard to an actively licensed CPA and those cases were decided with regard to different predecessor statutes and absent any similar rule in place, they provide direction. Those cases are persuasive (1) that a balanced weighing of all indicia of the "practice of public accounting" is to be done when determining whether or not a practitioner is "holding out as a CPA," (2) that a single indicator of whether or not a practitioner is "holding out" should not outweigh any other indicator, and (3) that the degree of benefit derived by the CPA from use of his or her CPA status must also be balanced against any real or potential harm therefrom to the public.

17. On their face, Ibanez' business card and yellow pages listing may reasonably be considered "advertising." "Advertising" is commonly thought of as constituting "holding out" a person, a product, or a service, but in this case, Ibanez' business card and yellow pages listing go no further than conveying to the public passive, but valuable, biographical information which every actively licensed CPA is entitled to assume, use, and append to his name in a variety of ways. The record is utterly

devoid of any evidence that Ibanez has mislead the public into believing she would perform all the functions of a CPA. The fact that her listing in the yellow pages is under the heading "attorneys" and is not associated with accountancy headings is especially significant in this regard, as is the care with which she has labelled her law office and instructed her staff. No dishonesty or misleading activity has been shown in this case, except to the extent that advertisement of her CPA status initially inaccurately suggests that she is subject to broad disciplinary oversight by the licensing agency. Her subsequent disclaimers as to what she will or will not undertake professionally would seem to "cure" any potential for the public to be mislead by her advertising.

18. In analyzing all indicia of "holding out," disclaimers may be considered. In the recommended order underlying the *Cenac* case, Hearing Officer Ayers considered as significant all disclaimers by the practitioner to his clients that the practitioner was not practicing public accounting or was not offering all of the services normally associated with CPA status. The reviewing court did not disturb the hearing officer's assessment that such disclaimers are significant to determine the issue of "holding out" and the issue of whether there had been actual or potential fraud upon the public.[4]

---

[4] The opportunity and effectiveness for use of disclaimers by professionals so as to not mislead the public has most recently been explored in *Peel v. Attorney Registration and Disciplinary Comm'n*, ___ US ___, 110 S. Ct. 2281, 110 L.Ed. 2d 83 (1990). See, also "Post-Peel Battles", *The National Law Journal*, Vol. 14 No. 17-18 (December 30, 1991 – January 6, 1992).

19. Although DPR urges a more literal and far more restrictive reading of the term "hold themselves out as public accountants," such a highly restrictive interpretation is not appropriate when dealing with commercial free speech. Commercial free speech constitutes expression related exclusively to the economic interests of the speaker and the audience. DPR's concept that merely appending the designation "CPA" after Ibanez' name misleads the public and must be prevented would constitute a speaker specific, unqualified ban on a category of expressive activity without any appropriate limitation based on time, place, or manner. Since this record is devoid of proof that anyone has been mislead by Ibanez, and it is clear her disclosure is valuable to her audience, great care must be taken before applying a highly restrictive interpretation of the statute. Contrary to DPR's urging, where a less restrictive interpretation is available, one should not assume that *any* benefit to the CPA, no matter how small that benefit may be, will be sufficient to concomitantly subject the CPA to discipline absent some demonstrated harm to the public. Consequently, where, as here, no evil to be prevented by the police power has been clearly demonstrated, the balance weighs against finding Ibanez to be "holding out."

20. The concept of balancing the benefit derived by the speaker (a CPA in this case) against the evil sought to be defended against by the police power of the state was only peripherally discussed in *Cenac*, but that balancing test for interpreting statutes has since been echoed and refined in other cases involving commercial free speech. See, *Central Hudson Gas v. Public Service Commission*, 447 US 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980) and *Florida*

Bar v. Brumbaugh, 355 So. 2d 1186 (Fla. 1978). The potential for harm to the public must be recognizable and must clearly outweigh any anticompetitive impact, and other, less restrictive means of regulating the licensee must not be available. Blanket prohibitions on commercial speech are disfavored in the law. Any restriction on commercial speech requires the government goal to be substantial and the cost to be carefully calculated. There must be a "reasonable fit" between the statute's ends and the means chosen to accomplish those ends. Government may ban commercial speech that is more likely to deceive the public than to inform it or commercial speech that is related to illegal activity. However, in most other contexts, the First Amendment prohibits regulation based on the content of the speech, provided the content is basically truthful. Where the information is presented in a way that is not deceptive it should be permitted even though potentially misleading. See, *Fane v. Edenfield*, Case No. 90-3943 U.S. Ct of Appeals, 11th Circuit, 945 F. 2d 1514 (October 30, 1991), specifically ruling that Chapter 473 *F.S.* "must be narrowly tailored to achieve its anticipated objectives." See also, *Bd. of Trustees of State University of New York v. Fox*, 492 US 469, 109 S.Ct. 3028, 106 L. Ed. 2d 388 (1989); *Shapero v. Kentucky Bar Ass'n*, 486 US 466, 108 S. Ct. 1916, 100 L. Ed. 2d 475; *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 US 328, 106 S. Ct. 2968, 92 L. Ed. 2d 266 (1986); *In re R.M.J.*, 455 US 191, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982); and *Consolidated Edison Co. of N.Y., Inc. v. Public Service Cmm'n*, 447 So. 2d 530, 100 S.Ct. 2326, 65 L. Ed. 2d 319 (1980). If this statutory and regulatory scheme were interpreted as DPR requests, it could be determined to be unconstitutional.

Courts have a duty, if reasonably possible and consistent with constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutionality and to construe it so as not to conflict with constitutional provisions. See, *Industrial Fire & Casualty Ins. Co. v. Kwechin*, 447 So. 2d 1337 (Fla. 1983); *State v. Gale Distributors, Inc.*, 349 So. 2d 150 (Fla. 1977); *Marsh v. Garwood*, 65 So. 2d 15 (Fla. 1953). Accordingly, a construction of the statutory term "holding out" in consonance with the rationale in *Cenac* and *Dandelake* that the public is only harmed if substantially misled avoids any potential constitutional conflict in interpreting the provisions of Chapter 473 *F.S.* What is important in Ibanez' case is that, although she is an actively licensed CPA, she has induced no unwarned reliance on her CPA certification. She has made full disclosure with disclaimers appropriate to the situation.

21. The foregoing conclusion that Respondent Ibanez is not "holding herself out as a CPA" so as to be subject to license revocation, suspension, or other discipline by the Board resolves in her favor all issues raised in all three counts of the Amended Administrative Complaint. However, that pleading is somewhat less than clear, so some further commentary as to the specific charges may be in order.

22. Count I of the Amended Administrative Complaint originally contained allegations under Sections 473.309 and 473.3101 *F.S.* that Ibanez' law firm should have been licensed and was unlicensed as a certified public accounting firm. That allegation was withdrawn by Petitioner as reflected in the August 22, 1991 Order on Reconsideration. Consequently, Count I of the Amended Administrative Complaint herein only charged Ibanez

pursuant to Sections 473.323(1)(a) *F.S.* [violation of Sections 473.317 and 455.227(1) or any other provisions of Chapter 473 *F.S.*], Sections 473.323(1)(g) *F.S.* [fraud or deceit, or of negligence, incompetency or misconduct *in the practice of public accounting*] and 473.323(1)(h) *F.S.* [violation of any rule adopted pursuant to chapters 473 or 455], and Rule 21A-20.012 *F.A.C.*, now determined to be invalid. [Emphasis supplied]

23. Section 473.317 *F.S.* involves competitive negotiation wherein the licensee will attest as an expert in accountancy. Section 455.227(1) *F.S.*, is a professional disciplinary "catchall." The Amended Administrative Complaint herein alleges no specific acts constituting competitive negotiation and no factual evidence to that effect was introduced at formal hearing. The evidence is clear that Ibanez does not perform the "attest" function unique to CPAs which is an integral part of Section 473.317 *F.S.* DPR's proposed recommended order does not even argue those issues. Due to DPR's withdrawal of the charges in Count I specifically citing Sections 473.309 and 473.3101 *F.S.*, as recognized in the Order on Reconsideration, it must be concluded that Ibanez could not be held in this proceeding to have violated those statutory provisions which were withdrawn. Therefore, even *if* Ibanez were practicing public accounting and was therefore subject to the Board, those charges alleged under Count I were not established in this case.

24. Under Count II, Ibanez was also charged with violating Sections 473.323(1)(g) [fraud or deceit, or of negligence, incompetency, or misconduct, *in the practice of public accounting*] and (h) *F.S.* [violation of any rule adopted pursuant to Chapters 473 or 455 *F.S.*] and Rule

21A-24.001(1)(g) *F.A.C.* Therein, Ibanez was prosecuted for her use of the CFP designation as a specialty designation on her business cards and in her yellow pages listing. In Count III, Ibanez was prosecuted for using her CPA designation in such a way that it is "misleading," in that she has allegedly represented to the public that she abides by all provisions of Chapter 473 *F.S.* Count III specifically charged Ibanez pursuant to Section 473.323(1)(f) [advertising goods or service sin a manner which is fraudulent, false, or misleading in form or content] and again pursuant to Sections 473.323(1)(g) and (h) *F.S.* and apparently under *all* of the sections of Rule 21A-24.001 *F.A.C.*

25. Assuming, *arguendo,* that Ibanez had been found to be "practicing public accounting" so as to be subject to the advertising rule, she still could not be found guilty of committing any violation thereof alleged under Counts II or III upon the facts in this record. Either because of her active CPA licensure or because Ibanez has, in fact, earned the CPA and CFP credentials or because the rule sections simply do not apply, Ibanez' situation does not fall within Sections (1)(a) through (f) or Section (1)(h) of Rule 21A-24.001 *F.A.C.* With regard to the remaining sections of that rule, (1)(j), (g), and (i), the Board's opinions have declared "CFP" to be an unrecognized specialty of public accounting. The Board also has never recognized the IBCFP. However, the Board has promulgated no rule concerning "CFP" specifically and has failed to prove up any rationale for its policy with regard to "CFP" or "certified financial planner" contained in its letter opinions. Ms. Rice's testimony belied any suggestion that the CFP

designation used with the CPA designation *implies* specialization in public accounting or misleads the public to that effect. Certainly, Ms. Rice did not *infer* that Ibanez' use of the abbreviation "CFP" "held out" a specialty of public accountancy. With further regard to (1)(g) of that rule, it should be recognized that Ibanez has not stated on her cards or in the yellow pages that CFP is an accountancy specialty or that by obtaining that credential, she is a specialist in public accounting, and DPR has stipulated that for purposes of Section 21A-24.001(1)(g), "CFP" is not a "self-designation." Rule 21A-24.001(1)(i) specifies that a CPA may not state a non-Board form of recognition using the word, "certified." "CFP" is a form of recognition by an entity other than the Board, but there is no clear and convincing evidence of a violation of Section 21A-24.001(1)(i) since Ibanez has only implied the word "certified" by using the abbreviation "CFP." There also is no proof her use of "CFP" and/or "CPA" and "CFP" has mislead [sic] anyone.

26. Therefore, even *if* Ibanez were practicing public accounting and were therefore subject to the Board, none of the charges alleged under Counts II or III were established in this case.

RECOMMENDATION

Upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Accountancy enter a Final Order that:

(1) Finds Respondent Ibanez is not "holding herself out as a certified public accountant" and

(2) Finds her not guilty of all charges alleged under Counts I through III and dismisses them

DONE and ENTERED this 15th day of January, 1992, at Tallahassee, Florida.

/s/ Ella Jane P. Davis
ELLA JANE P. DAVIS,
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the Division of Administrative Hearings this 15th day of January, 1992.

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS: All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party *at least 10 days* in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. *You should consult with the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order.* Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.

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Case No. 91-4100

APPENDIX TO RECOMMENDED ORDER
CASE NO. 91-4100

The following constitute specific rulings pursuant to Section 120.59(2) *F.S.* upon the parties' respective proposed findings of fact (PFOF):

DPR's 39 PFOF:

Accepted except where subordinate, unnecessary, or cumulative to the facts as found. Material which falls in any of those categories has *not* been utilized in the recommended order (RO): 1, 9-11, 13-15, 20, 24, 26, 34-36, 38.

Rejected as stated because *as stated* these PFOF are misleading or constitute unreconciled or isolated record evidence or

constitute or contain a conclusion of law (COL) or constitute mere legal argument, but otherwise the subject matter is covered in the RO: 2-3, 12, 25, 27, 31-33, 37, 39.

Rejected as subordinate, unnecessary, or cumulative or otherwise nondispositive of the material issues once Rule 21A-20.012 is invalidated: 16-19, 21-23, 28, 32.

Rejected as immaterial except to the degree covered in the RO: 4-8.

Accepted in part and rejected in part on issues of credibility; covered in the RO: 29-30

Respondent's 56 PFOF:

Accepted except where subordinate, unnecessary, or cumulative to the facts as found. Material which falls in any of those categories or which is material only to the rules challenge case and not this disciplinary case has *not* been utilized in the recommended order (RO): 1-7, 10, 14, 17, 24, 34-35, 40, 42-46, 48-50, 52-56.

Rejected as stated because *as stated* these PFOF are misleading or constitute unreconciled or isolated record evidence or constitute or contain a conclusion of law (COL) or constitutes mere legal argument, but otherwise the subject matter is covered in the RO: 11-13, 15, 19, 27, 39, 47, 51.

Rejected as subordinate, unnecessary, or cumulative or otherwise nondispositive of the material issues in this disciplinary case: 8-9, 16, 18, 20-23, 25-26, 28-33, 36-38.

Rejected as Immaterial: 41.

STATE OF FLORIDA
DEPARTMENT OF PROFESSIONAL REGULATION
BOARD OF ACCOUNTANCY

STATE OF FLORIDA, DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF ACCOUNTANCY,

Petitioner,

vs.

SILVIA IBANEZ,

Respondent.

_____/

DOAH CASE NO. 91-4100
DPR CASE NO. 90-13805

FINAL ORDER OF THE BOARD OF ACCOUNTANCY

(Filed May 12, 1992)

THIS CAUSE came on before the Florida Board of Accountancy at a regularly scheduled meeting on April 23, 1992 in Tampa, Florida pursuant to a Proposed Recommended Order of Hearing Officer, Ella Jane P. Davis dated January 15, 1992. The Board, noting that no exception [sic] have been filed and after reviewing the complete record, including all exhibits, hereby enters this Final Order of the Board of Accountancy.

FINDINGS OF FACT

The Board after a complete review of the record and the transcript of the hearing in the above-style cause,

hereby accepts the Proposed Findings of Fact of the Hearing Officer as set forth in her Recommended Order of January 15, 1992, with the exception of the following:

The second sentence of paragraph 7, and paragraphs 13, 21 and 23 of the Proposing [sic] Findings of Fact are legal conclusions and should not properly be in the Proposed Finding of Fact and are therefore struck. As to Proposed Finding of Fact No. 24, the next to the last sentence is partially incorrect, insofar as the Board has adopted a rule (Rule 21A-24.001(1)(g)-(j) [specifically Rule 21A-24.001(1)(i)]) setting forth, in rule form, the Board's policy as to the use of the term "certified" and its relationship to false, fraudulent, deceptive and misleading advertising. As such therefore, for purposes of the disciplinary action, neither the Department of Professional Regulation, nor the Board of Accountancy (which is a nominal party to the disciplinary action) is required to prove up the rationale for that rule. Paragraph 27 is struck as a legal conclusion inappropriately found in the Proposed Findings of Fact.

CONCLUSIONS OF LAW

The Conclusions of Law of the Hearing Officer in her Recommended Order of January 15, 1992 erroneously misapply the provisions of Chapter 473, F.S., and Chapter 21A, F.A.C., as well as misanalyze applicable provisions of the United States Constitution relating to regulations on commercial speech. In light of the foregoing, the Board of Accountancy is compelled to reject the Conclusions of Law of the Hearing Officer, and to substitute the following.

I

Initially it should be noted that, with the exception of the attest function,[1] all other activities of certified public accountants are activities which are not prohibited to any non-CPA in the State of Florida. As a result, with the exception of the attest function, Chapter 473, F.S., is a "Title Act." To the extent that Chapter 473 is a Title Act, its sole purpose is to provide consumers with the knowledge that if they use a CPA's services, and those services are within the practice of public accounting, as defined in Section 473.302(4), F.S., that a CPA will be subject to technical, educational and other standards promulgated by the Florida Legislature and the Board of Accountancy. Further, a consumer is assured that the CPA will adhere to certain regulatory requirements deemed necessary by the Legislature of the State of Florida to assure the independence, objectivity and integrity of the CPA.[2]

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[1] The attest function is defined as the independent opining on the truth and accuracy of financial statements, and is a function which is specifically permitted only to certified public accountants, see Section 473.322(1)(c), F.S.

[2] Including *inter alia*, Section 473.315,F.S., and Rule 21A-22, technical standards mandated by the legislature and promulgated by the Board of Accountancy; prohibitions on commissions and contingent fees, Section 473.3205, and 473.31, F.S.; requirements that a CPA not violate any of the disciplinary provisions of Chapter 473.323 and Rule 21A-36, that a CPA's practice will comply with the licensure of partnerships corporations, and rules promulgated thereunder, see Section 473.309, and 473.3101, F.S. All of the foregoing are in addition to 473.322(1)(b), F.S., which requires that any individual using the term "CPA" in the State of Florida must hold an active license (including meeting all continuing education requirements) from the Board of Accountancy.

As was noted in *Abramson v. Gonzalez*, 949 F.2d 1565 (11th Cir. 1992), as well as *Smith v. California*, 336 F.2d 530 (9th Cir. 1964), the function of a Title Act is not to preclude individuals who *are not* licensed from performing a certain set of tasks, but rather to let the public know that those individuals who *are* licensed have met, and continue to meet, the standards set out by the legislature and the appropriate regulatory boards through statutes and rules.

In light of the foregoing, it is necessary to address what, under Florida Statutes, is the practice of public accountancy. The provisions of Section 473.302(4), F.S. define the practice of public accountancy as follows:

> "Practice of," "practicing public accountancy," or "public accounting" means:
>
> (a) Offering to perform or performing for the public one or more types of services involving the use of accounting skills, or one or more types of management advisory of consulting services, by a certified public accountant, or firm of certified public accountants, of this state, including the performance of such services in the employ of another person; or (b) Offering to perform or performing for the public one or more types of services involving the use of accounting skills, or one or more types of management advisory or consulting services, by any other person holding himself or itself out as a certified public accountant or a firm of certified public accountants, including the performance of such services by a certified public accountant in the employ of a person so holding himself or itself out.

> However, these terms shall not include services provided by the American Institute of Certified Public Accountants or the Florida Institute of Certified Public Accountants, or any full service association of certified public accounting firms whose plans of administration have been approved by the board, to their members or services performed by these entities in reviewing the services provided to the public by members of these entities.

The Board of Accountancy has further refined the term in question through the promulgation of both Rule 21A-20.011, F.A.C,[3] excluding certain activities from the practice of public accountancy," and Rule 21A-20.012, F.A.C.,[4]

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[3] This rule was promulgated to exempt certain activities of CPAs, from the practice of public accountancy either when those CPAs are not, in fact, offering accounting services to the public, but only to their employer, or when they are not associated with financial statements and/or when they are not holding themselves out as certified public accountants. The rule was promulgated in order to address the concerns raised in *Cenac v. Florida State Board of Accountancy*, 399 So.2d 1013 (Fla. 1st DCA 1981). In *Cenac*, the First District Court of Appeal clearly indicated that to define the practice of public accountancy so as to foreclose the use of the broad range of accountancy skills to CPAs who do not trade on the fact of their licensure through advertising or public display of the appellation "CPA," and who are not engaged in the preparation of financial statements, could result in an unconstitutional and unreasonable attempt to regulate and prohibit activities of individuals who happen to hold licenses as CPAs, but who do not trade on the fact of their licensure as CPAs.

[4] This rule has recently been declared invalid, see *Ibanez et al., v. State Board of Accountancy et al.*, DOAH Case No. 91-3336R, Opinion rendered January 15, 1992. Appeals pending before the First District Court of Appeal Case Nos. 92-439, 92-440. While

defining the term "holding out" which is contained in Section 473.302(4)(b), F.S.

To the extent therefore, however, that a CPA is providing one or more types of accounting skills and management advistory [sic] services to the public, and at the same time holding himself or herself out as a CPA, such an individual is practicing public accounting. Any other construction of the definition of the practice of public accounting would permit individuals, engaged in offering accounting services to the public and holding the CPA license, to trade upon the fact of their licensure, and to advertise that fact, while not being subject to the statutes and rules governing CPAs in the State of Florida. It is difficult to conceive how, to the extent Chapter 473 is a Title Act, it could legitimately be said to protect the public health, safety and welfare, if individuals who trade on that Title in commerce while using their accounting skills for the public, are not subject to the jurisdiction of the Board of Accountancy.[5]

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the Board could rely on Rule 21A-20.012 pending the appeal, see Rule 9.310(b)(2), Fla.R.App.P., the Board's ruling in the instant cause is based solely upon the provisions of Chapter 473 and *other* applicable rules.

[5] It is specifically to be noted that other than by committing acts of fraud, see Section 473.323(1)(k), F.S., or lack of good moral character, see Section 473.323(1)(m), F.S., or similar violations CPAs can only be disciplined by the Board of Accountancy, if they are practicing public accountancy, and they are found guilty of the violations set forth in Section 473.323, F.S. In other words, with the above mentioned exceptions, CPAs who are not practicing public accountancy can not [sic] be disciplined by the Board of Accountancy for their transgressions.

The Hearing Officer, in coming to her conclusion that Respondent was not practicing public accountancy, and thus can not [sic] be guilty of false, fraudulent, deceptive or misleading advertising, depended largely upon a constitutional analysis, which, in the Board's opinion, is flawed. As is noted above, with the exception of the attest function (not at issue herein, since Respondent does not perform the attest function), Chapter 473 and [sic] is a Title, not a Practice act.

In *Abramson v. Gonzalez, supra,* at pp. 1575-1577, the Eleventh U.S. Circuit Court of Appeals analyzed at length the impact of Title Acts, as they relate to First Amendment guarantees of freedom of speech. While holding that unlicensed individ-uals [sic] cannot be prohibited from using generic terms, which described activities that they are permitted to perform under a Title Act, the Eleventh Circuit was firm in its opinion, that, if "unlicensed" individuals call themselves "licensed", they would be engaging in false, deceptive or misleading advertising and be subjected to penal provisions, including criminal and injunctive proceedings.

In the instant cause, Respondent is essentially engaged in the same type of activity which the Eleventh Circuit held could be banned by the State. In other words, Respondent advertises the fact that the [sic] she is a CPA, while performing the same "accounting" activities she performed when she worked for licensed CPA firms, but she does not concede that she is engaged in the practice of public accounting so as to bring herself within the jurisdiction of the Board of Accountancy for any negligence or errors she may be guilty when delivering her services to her clients.

Respondent is unwilling to acquiesce in the requirements of Chapter 473 and Chapter 21A, F.A.C., by complying with those requirements. She does not license her firm as a CPA firm; forego certain forms of remuneration denied to individuals who are practicing public accountancy; or limit the ownership of her firm to other CPAs. Respondent places the term "CPA" after her name on her business cards and letterhead, and in the yellow pages of the telephone directory all of which, by any standard, must be considered advertising.[6] Respondent further offers services to the public which, by her own admission, involve the use of the same accounting skills she used when she was performing accounting services in a CPA firm by so doing. Respondent has, in effect, told the public that she is subject to the provisions of Chapter 473, and the jurisdiction of the Board of Accountancy when she believes and acts as though she is not.[7] In light of the foregoing, Respondent is in violation of Rule 21A-24.001

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[6] See *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466, 108 S.Ct. 1916 100 L.Ed.2d 475 (1988), *Peel v. Attorney Registration and Disciplinary Com'n.*, ___ U.S. ___, 110 S.Ct. 2281, 2287 (1990), Rule 4-7.2 Rules of the Florida Bar.

[7] It is to be noted that Respondent could have simply been charged with practicing public accountancy through an unlicensed corporation in violation of Section 473.309, 473.3101 and 473.323(1)(a), F.S. Notwithstanding this fact, since the ultimate issue in this cause must be whether nor not Respondent is indeed practicing public accountancy by offering accounting services and using accounting skills while trading on the fact of her licensure as a CPA in without complying with the provisions of Section 473 and the rules promulgated thereto, and thus deceiving or misleading the public, it is appropriate to approach these alleged violations in the context of deceptive or misleading advertising.

and Section 473.323(1)(f), F.S. by engaging in deceptive, false and misleading advertising.

In order to analyze whether the Board's interpretation of its statute and rules is constitutional, one must turn to the Supreme Court's test for regulations on protected commercial free speech, set forth in *Central Hudson Gas & Electric, Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980), as follows:

> In commercial speech cases, then, a four part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted government interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

It is obvious that the use of a professional license appellation such as "CPA" is a form of commercial speech which, in the case of a CPA who holds an active individual license, is not illegal or inherently misleading. Thus, the statutes which limit the use of "CPA" licensure designation do impact First Amendment rights and satisfy the first prong of the *Central Hudson* test.

The second prong is satisfied, since it is obvious that the regulation of the practice of public accountancy is a valid governmental interest, indeed a vital one, see

United States v. Arthur Young & Co., 465 U.S. 805, 817-821, 104 S.Ct. 1495, 1503-1504, 79 L.Ed.2d 826 (1984), *Mercer v. Hemmings*, 170 So.2d 33 (Fla. 1964).

The rules and statutes in question satisfy the third prong of furthering the abovementioned governmental interest through making sure that only an individual who meets certain standards is permitted to call oneself a CPA. Included in those standards is the requirement that if an individual provides accounting services to the public while trading on the fact of his/her licensure, one must subject oneself to the statutes and rules governing the practice of public accountancy in the state. Needless to say, the use of the term "CPA" by an individual providing accounting skills and services to the public, while that individual at the same time asserts that one is not subject to the regulations of the statutory body created to regulate certified public accountants, would not further the purpose for CPA licensure set forth in Section 473.301, F.S.

Finally, the statutes and regulations in question, which simply require that individuals, who trade on the fact of their licensure as CPAs while offering accounting skills and services to the public, must comport with the rules and regulations governing the practice of public accounting, is a "reasonable fit" between the public good, i.e., and knowledge that any individual trading on the fact they are CPA, will be regulated by the public and agency in question, and the limitation on individual licensee's rights to call oneself a CPA while not complying with the requirements of the statute. *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028, 3034 106 L.Ed.2d 388 (1989). Since the

statutes and regulations only apply to those individuals who are engaged in offering accounting services to the public, as opposed to those who are in government or providing services only to their employer, it is appropriate that individuals should not be permitted to append the term "CPA" after their name, even though they hold an active license, if they are providing accounting services and skills to the public, but are not in compliance with all provisions of Chapter 473.[8]

The Hearing Officer's ruling that Respondent's advertising that she is a CPA in the telephone directory and in her business communications, can be remedied by verbal and visual disclaimers is in error. In essence, Respondent advertises the fact that she is a CPA to the general public, and performs identical or similar services

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[8] The Hearing Officer apparently placed great weight upon the fact that the CPA certificate states that the recipient "has passed all examinations and has met all other requirements prescribed by law and by rule of this board for certification as an expert public accountant, and is therefore entitled to append the letters CPA after this registrant's name to evidence registration by this board as a Certified Public Accountant." See Proposed Finding of Fact No. 4, and Proposed Conclusion of Law No. 15. The certificate is, of course, only evidence of a license. It is difficult to conceive, when construing the above mentioned terms on the CPA's certificate, that an individual is entitled to advertise the fact of licensure if that individual was not in compliance with all provisions of Chapter 473, and Chapter 21A, F.A.C. To do otherwise, would be to permit an individual to use the title "Certified Public Accountant" when advertising and providing accounting skills and services to the public, but not to be subject to those statutes and rules, which were specifically enacted to secure the integrity and objectivity of CPAs when providing such services.

to those which Respondent admits she performed in licensed CPA firms. Respondent and the Hearing Officer, however, apparently believe that since Respondent could verbally tell potential clients that she was not practicing public accounting, that the clients would have no reasonable expectation that Respondent would be subject to the rules and regulations of the Board of Accountancy. Potential clients, however, would clearly see Respondents [sic] use of the title "CPA" in her advertisements as an inducement to contact Respondent and seek her services thinking that she was a licensee subject to the rules of the Board of Accountancy. Since Respondent uses her accounting skills in then providing services to clients, it is illogical to believe that any disclaimer would disabuse a client of believing that Respondent's failure to meet adequate standards of professional competence would not result in disciplinary action by the very agency which granted her the license which she trades upon. It is axiomatic that the improper use of a Title when providing the services described by the Title by an individual either not licensed under the act, or unwilling to comply with various provisions of the statute and rules, when holding a license, is inherently misleading and may be prohibited. See *Accountant's Society of Virginia v. Bowman*, 860 F.2d 602, 605-606 (4th Cir. 1988). Since Chapter 473 and the rules promulgated thereto place reasonable conditions upon CPAs who wish to trade upon the fact of licensure in connection with using accounting skills and providing accounting services to the public, it is apparent that the Board's position that a CPA must comply with the statutes and rules when trading upon the fact of licensure as

a CPA, constitutes a "reasonable fit" for constitutional purposes.[9]

II

The Hearing Officer also found that the use of the term "CFP" (standing for Certified Financial Planner) by Respondent, in the telephone directory yellow pages, as

[9] It is asserted by Respondent that since she is an attorney regulated by the Florida Bar, that the Board of Accountancy's assertion that she must comply with the provision of Chapter 473 and the rules promulgated thereto when she trades on the fact of her licensure as a CPA, and provides accounting services, constitutes the unlawful regulation of the practice of law. This position is erroneous. The mere fact that the Florida Bar permits attorneys to list other professional licenses as part of their credentials, see Rule 4-7.4, Rules of the Florida Bar, does not, and can not limit the responsibility of the dual license-holding attorney of complying with the requirements and rules of the other profession. It is obvious, for example, that any attorney who happens also to be a real estate broker, and who sells real estate in his law practice, can and will be subject to the Florida Real Estate Commission, for any violations of Chapter 475, and the rules promulgated thereto when he is selling real estate. This does not mean that the attorney will not also be subject to the rules of the Florida Bar, if, in the same real estate transaction, the attorney gave an erroneous title opinion. Dual license holding can and should subject the license holder to dual responsibility to the regulatory agencies having jurisdiction over the licensee. It is up to the licensee to resolve conflicts between the rules and statutes of the regulatory bodies, either by modifying the licensee's practice, so as to comport appropriately with all regulatory bodies, whose profession is being practiced by the licensee, or to cease leading the public to believe that the licensee complies with all regulatory requirements by trading on a license, when the license will not adhere to the strictures of that profession.

well as on her business card and letterhead, was not a violation of Rule 21A-24.001, F.A.C., and Section 473.323(1)(f), F.S.

Rule 21A-24.001(1)(g)-(j) and (2) states as follows:

> (1) No licensee shall disseminate or cause the dissemination of any advertisement or advertising which is in any way fraudulent, false, deceptive, or misleading, if it, among other things:
> (g) States or implies that the licensee has received formal recognition as a specialist in any aspect of the practice or public accountancy unless he has in fact received such recognition and such recognizing agency is approved by the Board. In the event a licensee uses the term "specialty" or "specialist" or any other term tending to indicate that he specializes in any aspect of the practice of public accountancy the advertisement must state that the use of the term is self-designation and is not sanctioned by the state or federal government in any advertisement or offering to the public unless such terms and recognition have been approved by the Board. However, a licensee may indicate the services offered and may state that practice is limited to one or more types of services when this is in fact the case; or
>
> (h) Represents that professional services can or will be competently performed for a stated fee when this is not the case, or makes representations with respect to fees for professional services that do not disclose all variables affecting the fees that will in fact be charged; or

(i) States a form of recognition by any entity other than the Board that uses the terms "certified," "public," or "auditor," or "auditing" however, this would not prohibit a licensee from disclosing that he is a CPA in another state or jurisdiction; or

(j) States or implies that the licensee has received formal recognition as a specialist in any aspect of the practice of public accounting, unless the statement contains a disclaimer stating that the recognizing agency is not affiliated with or sanctioned by the state or federal government. The advertisement must also contain the agency's requirements for recognition, including, but not limited to, educational, experience and testing. These statements must be in the immediate proximity of the statement that implies formal recognition as a specialist.

(2) As used in the rules of the Board, the terms "advertisement" and "advertising" shall mean any statements, oral or written, disseminated to or before the public or any portion thereof, with the intent of furthering the purpose, either directly or directly, [sic] of selling public accounting services, or offering to perform public accounting services, or inducing members of the public to enter into any obligation relating to such public accounting services. For purposes of this rule, oral or written statements include business cards and letterhead.

Insofar as the Board has found above that Respondent is practicing public accounting, it is obvious, as a matter of law, that her advertisements in the yellow pages, business cards and letterhead of the fact that she is

a Certified Financial Planner through the use of the initials "CFP", are violations of Rule 21A-24.001 as set forth above, and therefore, Section 473.323(1)(f), F.S.

Paragraph 25 of the Hearing Officer's Conclusions of Law, wherein she tasks the Board of Accountancy for not "proving up any rationale" for it's [sic] *rule* relating to the use of the term "certified" is outside the purview of the instant Section 120.57(1) proceeding. A Hearing Officer of the Division of Administrative Hearings, when faced with a promulgated rule, must apply that rule to the facts set before her. It is not necessary for the agency to prove up the rationale for the rule in every Section 120.57(1), F.S. hearing relating to the application of that rule before the Division of Administrative Hearings.

Notwithstanding the foregoing, the rationale for the Board's prohibition of the publication of credentials using terms such as "certified" by CPAs practicing public accounting when those designations have not been approved by the Board of Accountancy as specialties in the practice of public lexicon, "certified", when used in conjunction with public accountancy, means state licensure or approval. See *Peel v. Attorney Registration and Disciplinary Commission*, ___ U.S. ___, 110 S.Ct. 2294-95, (1990), (Marshall, J. concurring). It is the Board's position that the use, by a CPA, of any of the terms set forth in Rule 21A-24.001(1)(i), when those terms have not been approved by the Board is inherently misleading.

In balancing the public's right to know of attainments of CPAs in addition to their license as a CPA, it is the Board's position that the use of terms set forth in Rule 21A-24.001(1)(i), in conjunction with the term "CPA" and

the practice of public accounting, are so close to the terms protected by state licensure itself, that their use, when not approved by the Board, inherently mislead the public into believing that state approval and recognition exists. The terms prohibited by Rule 21A-24.001(1)(i), thus can only be used in conjunction with the term "CPA" when the Board has, in fact, approved a form of recognition or self designation using such terms as a Board approved speciality. It is to be noted that the Board has the authority to approve the use of such speciality designation by CPAs, however, no request has ever been made for approval either by Respondent or by the parent organization which awarded her the certificate as a Certified Financial Planner, cf. *Accountant's Society of Virginia v. Bowman, supra.*

As such therefore, it is apparent that Respondent has advertised the fact that she is a CFP or Certified Financial Planner, which, in the context of an individual practicing public accounting and trading on the fact that she is a certified public accountant, has been determined by the Board to be false, deceptive and misleading advertising by implying a speciality of public accountancy, not recognized by the Board of Accountancy.

CONCLUSION

Based upon the foregoing, Respondent is hereby found to be in violation of Section 473.323(1)(a), (f), (g), (h) and Rule 21A-24.001, F.A.C., and is hereby disciplined as follows:

Respondent is hereby REPRIMANDED with the imposition of the reprimand being stayed until any appellate proceedings in this cause are completed.

DONE and ORDERED this 23rd day of April, 1992, by the Florida Board of Accountancy.

/s/ Beryl H. Davis,
BERYL H. DAVIS,
CHAIRMAN

CC: Counsel of Record

wp/Ibanez(S)

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

SILVIA, S. IBANEZ,

Appellant,

v.

STATE OF FLORIDA, DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF ACCOUNTANCY,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 92-1994.

Opinion filed June 9, 1993.

Appeal from an order of the Department of Professional Regulation.

Silvia S. Ibanez, P.A., Winter Haven and J. Lofton Westmoreland, of Moore, Hill & Westmoreland, Pensacola, for appellant.

Lisa S. Nelson, Assistant General Counsel, Tallahassee, for appellee.

PER CURIAM.

AFFIRMED.

ZEHMER, BARFIELD, and MICKLE, JJ., CONCUR.

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904) 488-6151

June 9, 1993

CASE NO: 92-01994

L.T. CASE NO.
91-4100

Silvia S. Ibanez v. State of Florida, Dept. of Professional Reg.

Appellant(s), Appellee(s).

BY ORDER OF THE COURT:

Appellant's motion for attorney's fees is denied.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

/s/ Jon S. Wheeler
JON S. WHEELER, CLERK
By: Laurie Black
Deputy Clerk

[SEAL]

Copies:
Silvia S. Lbanez
Lisa S. Nelson
Kathryn L. Kasprzak
J. Lofton Westmoreland
Charles F. Tunnicliff

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904) 488-6151

July 28, 1993

CASE NO: 92-01994

L.T. CASE NO.
91-4100

Silvia S. Ibanez — v. State of Florida, Dept. of Professional Reg.

Appellant(s), — Appellee(s).

BY ORDER OF THE COURT:

Appellant's motion for rehearing filed, June 23, 1993, is hereby DENIED.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

/s/ Jon S. Wheeler
JON S. WHEELER, CLERK
By: Rhonda Causseaux
Deputy Clerk

Copies:
Silvia S. Lbanez
Lisa S. Nelson
Kathryn L. Kasprzak
J. Lofton Westmoreland
Charles F. Tunnicliff
Robin Harmon, Clerk

[SEAL]

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV
(Section 1, in part)

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

455.227 Grounds for discipline; penalties; enforcement.

(1) The board shall have the power to revoke, suspend, or deny the renewal of the license, or to reprimand, censure, or otherwise discipline a licensee, if the board finds that:

* * *

473.301 Purpose. The Legislature recognizes that there is a public need for independent and objective public accountants and that it is necessary to regulate the practice of public accounting to assure the minimum competence of practitioners and the accuracy of audit statements upon which the public relies and to protect the public from dishonest practitioners and, therefore, deems it necessary in the interest of public welfare to regulate the practice of public accountancy in this state.

History – ss. 1, 25, ch. 79-202; ss. 2, 3, ch. 81-318; ss. 10, 11, ch. 85-9.

Note – Repealed effective October 1, 1995, by s. 11, ch. 85-9, and scheduled for review pursuant to s. 11.61 in advance of that date.

473.317 Competitive negotiation.

(1) A licensee shall not make a competitive bid for a professional engagement in which the licensee will attest as an expert in accountancy to the reliability or fairness of presentation of financial information or utilize any form of disclaimer of opinion which is intended or conventionally understood to convey an assurance of reliability as to matters not specifically disclaimed.

(2) As used in this section, "competitive bid" means the submission of an offer to a prospective client, as distinguished from an existing client, or representative thereof, by a licensee, either orally or in writing, directly or indirectly, as either a prime contractor, a subcontractor, or a subcontractor using a prime contractor as a conduit, to perform a professional engagement for an estimated fee, a fixed fee, or a basis of fee when the surrounding facts and circumstances indicate that another licensee will be asked to make an offer, has been asked to make an offer, or has been made an offer which has not been rejected to perform the same professional engagement for an estimated fee, a fixed fee, or basis of fee as defined in this section. The performance of an engagement for a specific purpose, which engagement by its nature is not expected to recur, does not create an "existing client" relationship.

(3) The term "subcontractor" as used in this section means a subcontractor whose actions, together with the surrounding facts and circumstances, are in such a manner as to make him a party to a competitive bid or bids, either with respect to a specific engagement or as a result

of a series of engagements with the same prime contractor, without regard to whether a subcontract is entered into before or after the bid.

(4) A licensee may respond to any request from a person or entity for a proposal giving qualifications and other factual information, excluding any quotation as to basis of fee.

(5)(a) If a licensee's proposal in subsection (4) is the only proposal received or accepted by a person or entity, the licensee may negotiate a basis of fee for that engagement. If a person or entity receives more than one proposal for the same engagement, the person or entity may rank, in order of preference, the licensee to perform the engagement. The licensee ranked first may then negotiate a contract with the person or entity giving, among other things, a basis of fee for that engagement. Should the person or entity be unable to negotiate a satisfactory contract with that licensee, negotiations with that licensee shall be formally terminated, and the person or entity shall then undertake negotiations with the second-ranked licensee. Failing accord with the second-ranked licensee, negotiations shall be terminated and undertaken with the third-ranked licensee. Negotiations with the other ranked licensees shall be undertaken in the same manner. Once negotiations have been undertaken with a subsequent licensee, a licensee shall not contract with the requesting person or entity for the same engagement.

(b) The Legislature or the governing body of a municipality, in negotiating with licensees with respect to an audit engagement, may reopen formal negotiation with any one of the three top-ranked firms.

History – ss. 16, 25, ch. 79-202; ss. 1, 2, ch. 81-194; ss. 2, 3, ch. 81-318; s. 3, ch. 83-265; ss. 10, 11, ch. 85-9; s. 2, ch. 86-102.

Note – Repealed effective October 1, 1995, by s. 11, ch. 85-9, and scheduled for review pursuant to s. 11.61 in advance of that date.

473.322 Prohibitions; penalties.

(1) No person shall knowingly:

(a) Practice public accounting unless the person is a certified public accountant or a public accountant;

(b) Assume or use the titles or designations "certified public accountant" or "public accountant" or the abbreviations "C.P.A." or any other title, designation, words, letters, abbreviations, sign, card, or device tending to indicate that such person holds an active license under this act, unless such person holds an active license under this act;

(c) Attest as an expert in accountancy to the reliability or fairness of presentation of financial information or utilize any form of disclaimer of opinion which is intended or conventionally understood to convey an assurance of reliability as to matters not specifically disclaimed unless such person holds an active license under this act. This subsection shall not prevent the performance by persons other than certified public accountants of other services involving the use of accounting skills,

including the preparation of tax returns and the preparation of financial statements without expression of opinion thereon.

(d) Present as his own the license of another;

(e) Give false or forged evidence to the board or a member thereof for the purpose of obtaining a license;

(f) Use or attempt to use a public accounting license which has been suspended, revoked, or placed on inactive status.

(g) Employ unlicensed persons to practice public accounting; or

(h) Conceal information relative to violations of this act.

(2) Any person who violates any provisions of this section is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083.

History – ss. 20, 25, ch. 79-202; ss. 2, 3, ch. 81-318; ss. 10, 11, ch. 85-9; s. 104, ch. 91-224.

Note – Repealed effective October 1, 1995, by s. 11, ch. 85-9, and scheduled for review pursuant to s. 11.61 in advance of that date.

473.323 Disciplinary proceedings.

(1) The following acts constitute grounds for which the disciplinary actions in subsection (3) may be taken:

(a) Violation of any provisions of s. 473.317, s. 455.227(1), or any other provisions of this act;

(b) . . .

(c) . . .

(d) . . .

(e) . . .

(f) Advertising goods or services in a manner which is fraudulent, false, deceptive, or misleading in form or content;

(g) Upon proof that the licensee is guilty of fraud or deceit, or of negligence, incompetency, or misconduct, in the practice of public accounting;

(h) Violation of any rule adopted pursuant to this act or chapter 455;

* * *

FLORIDA BOARD OF ACCOUNTANCY REGULATIONS

21A-20.011 Practice of, or Practicing Public Accountancy

"Practice of, or practicing public accountancy" as defined by Section 473.302(4), F.S., shall exclude any of the following:

(1) Services rendered by a licensee as an employee of a governmental unit or an employee rendering accounting services only to his employer as long as that employer is not required to be licensed under F.S. 473, or

(2) Activities of licensees who do not hold themselves out as certified public accountants and who are not associated with financial statements, or

(3) Activities of licensees who do not hold themselves out as certified public accountants.

Specific Authority: 473.302, 473.304, 473.307, F.S. **Law Implemented**: 473.302, F.S. **History**: New 12-4-79, Amended 9-17-84, 1-25-87.

21A-20.012 Holding Out

"Holding himself or itself out" as used in F.S. 473.302(4) is defined as publicizing that the licensee is a certified public accountant when providing, or offering to

provide services or products to the public, in such manner that an uninformed person may not be able to differentiate whether or not the licensee may also be in the practice of public accounting. The display of the CPA certificate and license issued by the Department of Professional Regulation shall not constitute holding out under the terms of this rule. All other publications of the fact that a licensee is a CPA constitutes holding oneself out.

Specific Authority: 473.302,473.304, F.S. **Law Implemented**: 473.302, F.S. **History**: New 9-17-84.

21A-21.009 Other Business Activities

A licensee engaged in the practice of public accounting may concurrently engage in other business, occupation, or profession if:

(1) The licensee does not hold himself out as a certified public accountant in that activity,

(2) The activity is conducted under a name which the public will not associate with licensee's practice of public accounting,

(3) The other business, occupation, or profession is not u... to promote the practice of public accounting in any manner prohibited by Chapter 473, F.S.,

(4) Facilities used by the licensee in his public accounting practice and other activity conform to the requirements of 21A-26.001(3),

(5) The entity's dealings with the licensee's public accounting clients shall not violate the provisions of Chapter 473, F.S. and 21A, Florida Administrative Code, relating to integrity and objectivity,

(6) The entity does not interpret financial statements, forecasts or projections audited, reviewed, compiled or prepared by others.

Specific Authority: 473.304, 473.315, F.S. **Law Implemented**: 473.315, F.S. **History**: New 9-16-84.

21A-24.001 Advertising

(1) No licensee shall disseminate or cause the dissemination of any advertisement or advertising which is in any way fraudulent, false, deceptive, or misleading. Any advertisement or advertising shall be deemed by the Board to be fraudulent, false, deceptive, or misleading, if it, among other things:

(a) Contains a misrepresentation of facts; or

(b) Makes only a partial disclosure of relevant facts; or

(c) Creates false or unjustified expectations of beneficial assistance; or

(d) Appeals primarily to a layperson's fears, ignorance, or anxieties regarding his state of financial well-being; or

(e) Contains any representation or claims, as to which the licensee, referred to in the advertising, does not expect to perform; or

(f) Contains any other representation, statement, or claim which misleads or deceives; or

(g) States or implies that the licensee has received formal recognition as a specialist in any aspect of the practice of public accountancy unless he has in fact received such recognition. In the event a licensee uses the term "specialty" or "specialist" or any other term tending to indicate that he specializes in any aspect of the practice of public accountancy in any advertisement must state that the use of the term is a self-designation and is not sanctioned by the state or federal government in any advertisement or offering to the public unless such terms and recognition have been approved by the Board. However, a licensee may indicate the services offered and may state that practice is limited to one or more types of services when this is in fact the case; or

(h) Represents that professional services can or will be competently performed for a stated fee when this is not the case, or makes representations with respect to fees for professional services that do not disclose all variables affecting the fees that will in fact be charged; or

(i) States a form of recognition by any entity other than the Board that uses the terms "certified," "public," "auditor," or "auditing" however, this would not prohibit a licensee from disclosing that he is a CPA in another state or jurisdiction; or

(j) States or implies that the licensee has received formal recognition as a specialist in any aspect of the practice of public accounting, unless the statement contains a disclaimer stating that the recognizing agency is not affiliated with or sanctioned by the state or federal government. The advertisement must also contain the agency's requirements for recognition, including, but not limited to, educational, experience and testing. These statements must be in the immediate proximity of the statement that implies formal recognition as a specialist.

(2) As used in the rules of this Board, the terms "advertisement" and "advertising" shall mean any statements, oral or written, disseminated to or before the public or any portion thereof, with the intent of furthering the purpose, either directly or indirectly, of selling public accounting services, or offering to perform public accounting services, or inducing members of the public to enter into any obligation relating to such public accounting services. For purposes of this rule, oral or written statements include business cards and letterhead. **Specific Authority**: 473.304,473.323, F.S. **Law Implemented**: 473.323,F.S. **History**: New 12-4-79, Amended 2-3-81, 12-29-83, Formerly 21A-24.01, Amended 5-20-91.

Supreme Court, U.S.
FILED
FEB 28 1994
OFFICE OF THE CLERK

No. 93-639

In The

Supreme Court of the United States

October Term, 1993

SILVIA S. IBANEZ,

Petitioner,

v.

STATE OF FLORIDA,
DEPARTMENT OF PROFESSIONAL REGULATION,
BOARD OF ACCOUNTANCY,

Respondent.

On Writ Of Certiorari To The Florida First District Court Of Appeal

BRIEF FOR PETITIONER

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QUESTION PRESENTED

I. WHETHER THE FLORIDA BOARD OF ACCOUNTANCY'S BLANKET BAN ON AN ATTORNEY/CPA'S TRUTHFUL AND VERIFIABLE USE OF THE APPELLATIONS, "CPA" AND "CFP," ON BUSINESS CARDS, LETTERHEAD, AND TELEPHONE BOOK LISTINGS, VIOLATES THE ATTORNEY'S FIRST AMENDMENT RIGHT TO COMMERCIAL SPEECH.

PARTIES TO THE PROCEEDING

The following party was the Plaintiff below and is the Respondent before this Court:

State of Florida, Department of Professional Regulation, Board of Accountancy

The following party was the Defendant below and is the Petitioner before this Court:

Silvia S. Ibanez

References to the Record are:

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No. 93-639

In The

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October Term, 1993

SILVIA S. IBANEZ,

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v.

STATE OF FLORIDA,
DEPARTMENT OF PROFESSIONAL REGULATION,
BOARD OF ACCOUNTANCY,

Respondent.

On Writ Of Certiorari To The
Florida First District Court Of Appeal

BRIEF FOR PETITIONER

Petitioner, Silvia S. Ibanez, respectfully prays that this Court reverse the Order and Judgment of the District Court of Appeal of Florida, First District, entered in this proceeding on June 9, 1993.

OPINIONS BELOW

The opinion of the Florida District Court of Appeal, dated July 28, 1993, denying Petitioner's Motion for Rehearing is reprinted at J.A. 198. The order of the Florida District Court of Appeal affirming, without opinion,

the Florida Board of Accountancy ("BOARD") order was issued on June 9, 1993. It is unreported and reprinted at J.A. 196. The decision which was affirmed by the District Court of Appeals is the Order of the Board, dated April 23, 1992, also unreported, and reprinted at J.A. 178.

JURISDICTION

The Order of Affirmance of the Florida District Court of Appeal, First District, was entered on June 9, 1993. Petitioner filed a Petition for Rehearing on June 23, 1993. On July 28, 1993 the First District Court of Appeal denied the Petition of Motion for Rehearing.

This Court granted certiorari on January 14, 1994. Jurisdiction of this court to review the case of petition for Certiorari rests on 28 U.S.C. Section 1257(3). Because the First District Court of Appeal elected not to write an opinion, the Supreme Court of Florida was without jurisdiction to review this case and the First District Court of Appeal is the highest state court in which a decision could be had. Fla. Const Art V Section 3(B)(3); Florida Supreme Court manual of internal operating procedures II Al.(A) 396 So.2d LXXXV; *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980); *Palmore v. Sidoti*, 104 S.Ct. 1879 (1984).

CONSTITUTIONAL AND STATUTORY PROVISIONS

I. First Amendment to the U.S. Constitution

II. Fourteenth Amendment to the U.S. Constitution

III. Chapter 473, Florida Statutes, in relevant part

IV. Chapter 21A, Florida Administrative Code ("F.A.C.")

The constitutional, statutory, and regulatory provisions are reprinted at J.A. 199-210.

STATEMENT OF THE CASE

A. Introduction

Petitioner is a practicing attorney, a member of the Florida Bar, and holds an active Florida CPA license in good standing. She is also a registered advisor with the Florida Division of Securities, as well as a certified financial planner ("CFP"). She became a CFP, in 1988, four years after she left the practice of public accounting.[1]

The CFP certification is conferred by the International Board of Standards and Practice of Certified Financial Planners ("IBCFP"), a national non-profit organization.

The language in Petitioner's CPA certificate specifically authorizes her to display her CPA credentials:

[1] Petitioner left the field of public accounting in 1984, at R. 415.

> "SILVIA SAFILLE IBANEZ . . . *is therefore entitled to append the letters CPA after this registrant's name to evidence registration by this Board as a certified public accountant.*" J.A. 3.

As an actively-licensed CPA, Petitioner is authorized to perform the attest function, known as auditing. She can also prepare financial statements or be associated with financial statements; perform tax return preparation services; perform estate, tax or financial planning services; perform all types of general accounting and bookkeeping activities; represent clients in IRS audits; perform management consulting services; provide EDP/computer consulting services; perform litigation consulting services (i.e. expert witness); value closely held businesses, among other activities.[2]

Petitioner currently engages in the practice of law, as a sole practitioner and provides legal services for her clients not provided by CPAs. As a tax attorney, part of her customary professional activities includes tax opinion work, representation before the Internal Revenue Service, evaluation of the tax consequences of certain transactions, as well as financial and estate planning. In doing so, she utilizes both her legal education, training, and experience and her education, training and experience as a CPA. J.A. 152.

Both parties agree that many activities conducted by professionals and non-professionals, other than by CPAs, and other than by attorneys are identical to activities performed by CPAs engaged in public accounting. For

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[2] Pursuant to Sec. 473.302(4) Fl. St. and related regulations.

example, anyone can prepare a tax return.[3] Petitioner does not perform the attest function of a public accountant, i.e., she does not audit, which all parties agree is the only function which rests exclusively with CPAs.[4]

The Board concedes that except for Ibanez' use of the CPA and CFP credentials, she is a Florida licensed CPA in good standing. J.A. 150.

B. Disciplinary Complaint

The Board generated a complaint against Ibanez,[5] merely due to its receipt of an anonymously sent attorney yellow page listing, at J.A. 4, which had Petitioner's name circled. After her name, Petitioner had appended CPA, CFP. On July 30, 1991, the Board amended the complaint. The Hearing Officer allowed part of the amendment, pursuant to her Orders dated August 19, 1991 and August 22, 1991 at R. 79 and R. 103, respectively.

In essence, the Board's allegations, as amended, were:

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[3] Refer to Rule Challenge Order at J.A. 129.

[4] See Order of Hearing Officer at J.A. 153-154.

[5] On June 13, 1991, the Board charged her with an administrative complaint [at R. 1], based on her attorney yellow page listing and corresponding white page listing, alleging that she violated the Board's "holding out" rule, Rule 21A-20.012 F.A.C., and Subsection(g) of the Board's advertising rule, 21A-24.001 F.A.C., as well as related provisions in Sec. 473.323 Fl. St. The statute and regulations are reprinted at J.A. 200, and 206, respectively.

COUNT I: Petitioner is misleading the public by using the CPA credential in connection with her law firm.

COUNT II: Petitioner's use of the CFP credential in the attorney yellow pages and on her law practice business card constitutes false and misleading advertising of the practice of public accounting.

COUNT III: Petitioner's use of the CPA credential in the attorney yellow pages misleads the public into believing that she has complied with the Board's regulations and related Florida statutes.[6]

C. Administrative Hearing – Disciplinary

Petitioner's background and credentials were presented, as follows.[7]

- She holds a Bachelor's degree in Business Administration and a Master of Science degree in Accounting;
- She has held various licenses, including Florida securities license, securities principal license, insurance and annuities licenses, and other financial discipline licenses;

[6] These counts are summarized from the record, but are explained in depth by the Hearing Officer at J.A. 148 and again at J.A. 170-173. In turn, the rules and statutes cited therein have been reproduced at J.A. 200-210.

[7] In a prior proceeding, which has been admitted into the record of this disciplinary case, Petitioner gave testimony about her education, background and experience.

- She is a Certified Circuit Court Mediator, which is a certification conferred by the Florida Supreme Court;
- She worked during her college years, as a comptroller, part-time, and upon graduating, worked for CPA firms, off and on, until 1984; and
- She started a financial planning firm in 1985 and continued until 1988, when she started her law practice.[8]

The first "expert" called by the Board was Mr. Louis Dooner, the same expert used by the Board in *Edenfield v. Fane*, 507 U.S. ___, 123 L.Ed.2d 543, 113 S. Ct. ___ (1993).[9] Mr. Dooner[10] testified that Petitioner's use of the CPA designation of her attorney business card tells the public that she is offering to perform CPA services. He did not substantiate his conclusion with empirical studies or surveys. J.A. 25.

The Board's next witness, was Department of Professional Regulation ("DPR") employee, Elise Rice. Contrary to the Board's assertion in its Brief in Opposition to the Petition for Certiorari, at page 3, that Ms. Rice is a member of the public, in fact, Ms. Rice was an employee of DPR, the umbrella organization for the Board. Furthermore, her testimony was found to be "not persuasive" by

[8] See Hearing Transcript of Rule Challenge proceeding at R. 377 to R. 700.

[9] The Board did not present any Board members' testimony at the disciplinary hearing regarding the use of the credential, "CFP" or "CPA."

[10] Mr. Dooner testified that he had served as a Board member in the past. J.A. 19.

the hearing officer. J.A. 155. Ms. Rice clearly did not consider "CFP" as being connected to the "practice of public accounting," much less a specialty thereof. J.A. 155.

The Board then called Ms. Martha Willis, Executive Director of the Board, who could not explain why the Board deems CFP to be a specialty of public accounting. J.A. 39. Moreover, Ms. Willis conceded that: (1) the yellow pages attorney advertising that was a catalyst for the Board to generate an administrative complaint, was sent by an anonymous person (J.A. 45); (2) in her nine years[11] working at the Board, she. . . . "can't recall receiving a complaint from a member of the public that was not a CPA other than anonymous complaints" (J.A. 44); (3) starting in 1982, with the Board's first opinions[12] to a CPA-CFP, when the Board opined that CFP is a specialty designation, she does not know how the Board came to view CFP as a designation. J.A. 45-46.

Petitioner's case consisted of Petitioner's testimony[13], and that of Robert Goss, J.D., Executive Director

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[11] See J.A. at 39.

[12] The opinions of the Board are found at R. 235.

[13] This testimony consisted of testimony that she had given both at a related rule challenge hearing, as well as in the disciplinary hearing. The transcript of the rule challenge proceeding is found at R. 377-700; and the transcript of the disciplinary hearing is found at J.A. 7-115. The hearing officer issued rulings in both cases on January 15, 1992, and the respective Orders are found at J.A. 116 and J.A. 148 respectively.

of the IBCFP.[14] Petitioner's testimony is summarized below.

- Ibanez acknowledged that she is subject to Chapter 473 Fl. Stat. to the extent she is an active licensed CPA and Chapter 473 Fl. Stat. governs all active-licensed CPAs. J.A. 70.
- At the start of each engagement, she issues an "engagement letter" outlining the scope of her Firm's legal services. J.A. 154.
- Ibanez renders legal services to her clients consisting of legal representation before IRS; [R. 470]; interpretation of tax law and regulations; [R. 470] litigation expert witness regarding business matters, shareholder disputes, etc.; [R. 415] incorporation of businesses; [R. 496] and estate and financial planning. [R. 415]
- Ibanez' legal services are rendered to individuals, as well as corporate clients, but due to her type of practice, most are business people, or fairly sophisticated. [R. 441]
- She stated that all her representations to the public are that she is engaged in the practice of law. J.A. 68.
- When she is called to testify as in an expert witness in business cases and shareholder dispute cases, she discloses that she is a CPA, to describe her background and education, not as an expression of what profession she practices. [R. 426]

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[14] Effective February, 1994, the institution underwent a name change to "Certified Financial Planner Board of Standards."

- Ibanez represents to the public that her firm is a Law Firm, not a CPA firm; and as to herself, she identifies herself as a CPA. She considers that, individually she does "hold out", i.e. freely admits, she is a CPA, but only *for identification purposes* (emphasis supplied) J.A. 68.

Regarding Petitioner's CFP designation, the testimony of expert witness, Mr. Goss, clarified that financial planning is a separate discipline, rooted in the insurance and, to a lesser extent, the investment industries. Other critical information was provided: J.A. 53-66.

(1) CFP is a license that originated in academic environment; i.e., the College of Financial Planning;

(2) The IBCFP (a licensing, not a membership organization) has had exclusive jurisdiction over the use of the CFP mark since 1986;

(3) All CFPs are regulated by a Code of Ethics [Exhibit at R. 243, Volume II];

(4) The IBCFP's Code of Ethics specifically grants CFPs permission to use the "CFP" mark in combination with other professional credentials; i.e., CPA or educational designations, i.e., J.D., M.B.A., etc.;

(5) The CFP mark does *not* denote or imply a relationship to the practice of public accounting;

(6) In essence, the extensive examination of CFP candidates covers the areas of fundamentals of financial planning, risk management, investment planning, tax planning, estate planning, and fringe benefit and

retirement planning, which reflect the work of a certified financial planner and financial planning in general; this body of knowledge is tested through an examination process which is predicated on certain required educational components;[15]

(7) The regulation of financial planning as a body is carried on by the S.E.C. which requires that a financial planner should register as a registered investment adviser;

(8) Currently, there are more than 20,000 students engaged in financial planning courses which are administered by over 40 different higher learning or educational institutions. Some of these are provided at a graduate level, some are provided at an undergraduate level, and some are "certificate programs;"

(9) The students that enroll for any of the university-administered programs cannot become certified through the educational institution; it must seek certification through the IBCFP, which has proprietary control over "CFP", a registered trademark with the Federal Patent and Trademark Office in Washington, D.C. J.A. 66.

Finally, Mr. Goss verified that Petitioner is a currently licensed CFP. Mr. Goss explained that the only institution that may regulate or control the use of the CFP credential is the IBCFP and that the Florida Board of

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[15] See Exhibit 5 at R. 265 consisting of the IBCFP's general requirements.

Accountancy has never sought to enter into any arrangement with the IBCFP regarding the use of the CFP credential. J.A. 62. Furthermore, as a financial planning expert, he explained that any inference the financial planning or the CFP designation is a subdivision of public accounting is clearly erroneous. J.A. 63.

At the conclusion of the disciplinary hearing, Hearing Officer Davis, issued a "Recommended Order," reprinted at J.A. 147, recommending that all charges against Ibanez be dropped. J.A. 174.

D. Findings of Fact and Conclusion of Law Contained in Hearing Officer's Recommended Order.[16]

With few exceptions, the Board accepted most of the Hearing Officer's findings of facts:[17]

- Ibanez holds active, in good standing, CPA and CFP licenses. J.A. 150.
- The IBCFP is not affiliated with the Florida Board of Accountancy and has no proprietary interest over the CFP mark. J.A. 150.
- Ibanez is listed in the yellow pages under the heading "Attorneys"; she is also listed in the white pages as "Ibanez, Silvia S., CPA, CFP, atty." J.A. 156.

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[16] Reprinted at J.A. 147-177.

[17] Exceptions noted by the Board at J.A. 179: Paragraph 7 (second sentence), Paragraphs 13, 21, 23, Paragraph 24 (next to the last sentence, in part), and Paragraph 27.

- Ibanez is not listed in the yellow pages under "accountants," "accountants, certified," or "CPAs." J.A. 152.
- CPA status is a valuable property right to each CPA, and the ability of a practicing attorney to publicize the fact that she holds an active CPA license is a valuable asset to that individual. J.A. 128.
- The only activity among public accounting activities that is "unique" to CPAs is the "attest" function. There is no evidence that Ibanez attests as a CPA in the course of her law practice, or that she personally performs audits. J.A. 153-154.
- Ibanez has clearly marked her office premises with all the indicia of a law office on signs posted outside the building as well as on the building itself. A potential client must pass these two signs just to enter the building that houses Ibanez' law office. J.A. 154.
- Ibanez entered into legal contracts/letters with her clients setting forth the parameters of the legal services she has agreed to perform for the clients. J.A. 154.
- The agency presented no evidence by way of anecdotal experience, professional studies, or accumulated data to show that licensed CPAs or certified CFPs have ever misled members of the public purely by displaying their credentials in the manner Ibanez has done here. J.A. 157.
- Ibanez testified that her intent in appending the CPA and CFP credentials solely to her own name is to indicate that she is, in her own right, individually licensed as a CPA and CFP. J.A. 154.

Accordingly, the Hearing Officer recommended a decision in Ibanez' favor because none of Ibanez' activities could be held to be subject to discipline for the violations charged in the instant amended administrative complaint. J.A. 173-174.

Alternatively, the Hearing Officer found that even if Ibanez had been found to be practicing public accounting, then she could not be guilty of any of the counts alleged against her based on the facts in the record.[18]

Finally, the Hearing Officer explained that the Board's advertising rule found in Rule 21A-24.001 F.A.C. clearly does not apply to Ibanez' situation, as regards Subsections (1)(a) through (f) and (h).[19] As to the rest of the advertising rule[20], the Hearing Officer noted that the

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[18] Refer to paragraphs 23, 24, 25, and 26 at J.A. 171-173.

[19] The entire rule is reprinted at J.A. 208-210.

[20] Summarized in relevant part, they are: Subsection (g) prohibits language that implies formal recognition in any aspect of public accountancy, including prohibition of the term "specialist", as well as any other self-designation; (i) prohibits any form of recognition by any entity other than the Board, which uses the terms "certified", "public", "auditor", or "auditing"; and (j) prohibits language that the CPA has received formal recognition as a specialist in any aspect of the practice of public accounting, unless there is a disclaimer stating that the recognizing agency is not affiliated or sanctioned by the state or federal government. Subsection (j) also requires that the disclaimer state the agency's requirements for recognition, including, but not limited to, educational, experience and testing.

Board's previous opinions treated the CFP as an unrecognized specialty of public accounting,[21] yet the Board had never promulgated any rule concerning CFP specifically. Paragraph 25 at J.A. 172.

The hearing officer found it significant that the Board's witness, Ms. Rice "did not infer that Ibanez' use of the abbreviation CFP held out a specialty of public accountancy." Paragraph 25 at J.A. 172.

E. Decision of the Board of Accountancy

1. Deliberation of the Board – Official Public Meeting

At the outset of the Board's meeting, convened to decide Ibanez' case, the Board's counsel distributed a "Proposed Order."[22] The proposed order, ultimately voted on, and adopted by the Board [See R. 178-195, is the decision under review by this Court.

Upon receiving the "Proposed Order," Board Member Dr. Calhoun stated:

> "I don't know about the rest of the Board members, but having read all this legal hoop-de-do, it's amazing to me that anybody could understand anything where they stood in any event." R. 1340-1341.

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[21] Refer to Paragraph 25 at J.A. 172.

[22] Under Florida Law, Section 286.011, Florida Statutes, public officials must conduct their deliberations in the 'sunshine' (open to the public).

2. Order of the Board

Upon rejecting the Hearing Officer's recommendation to dismiss all charges against Ibanez, see J.A. 179, the Board of Accountancy stated several conclusions:

1. Although there is a general exclusion from the Board's jurisdiction over certain CPAs, as an attorney, Petitioner does not come within the exclusion because she deals with the public. Footnote 3 at J.A. 182.

2. Petitioner's failure to license her law firm as a CPA firm is tantamount to being an "unlicensed"[23] CPA.

These conclusions, although unsupported by the record or by any reasoning, form the basis for the Board's finding that Petitioner's attorney advertising, which is concededly commercial speech, is false and misleading and must be banned. J.A. 189 and 194.

The Board found that the public in Florida could be misled by Petitioner's use of her CPA credential in the attorney yellow page listing. According to the Board, Ibanez' mere disclosure of the CPA and CFP credentials in her attorney yellow page listing conveys two messages to the public:

1) that she is subject to the technical standards for the practice of public accounting promulgated by the Board, and

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[23] Though the Board's order vaguely suggests that Petitioner is "unlicensed" because her law firm is unlicensed, this point is moot because the "unlicensed firm" allegation was withdrawn by the Board, prior to the disciplinary hearing. The hearing officer explains the pertinent details at Paragraph 22, J.A. 170.

2) that she will continue to comply, in the future, with the Board's regulations.[24]

As to the use of the CFP credential, the Board issued its order finding Ibanez guilty of deceptive advertising after conducting a constitutional analysis under the case of *Central Hudson Gas and Electric Corp. v. Public Comm'n of New York*, 447 U.S. 557 (1980). This analysis resulted in the Board concluding that:

> " . . . it is apparent that Respondent [Petitioner herein] has advertised the fact that she is a CFP or Certified Financial Planner, which, in the context of an individual practicing public accounting and trading on the fact that she is a certified public accountant, has been determined by the Board to be false, deceptive and misleading advertising by implying a speciality of public accountancy, not recognized by the Board of Accountancy." J.A. 194.

(a) Re: CPA Credential

The Board's findings in regards to Petitioner's use of the CPA credential are:

> "that she is unwilling to acquiesce in the requirements of Chapter 473 and Chapter 21A, F.A.C. by complying with those requirements. She does not license her firm as a CPA firm;

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[24] Implicitly, the Board speculated that, as an attorney, Ibanez will not always be in compliance with its regulations, in the future, and this hypothetical event is the cause for disciplining Ibanez now. The Board uses the example of contingency fees, which attorneys customarily accept, but are prohibited under Chapter 473, Fla. Stat. See Footnote 2 at J.A. 180.

> forego certain forms of remuneration denied to individuals for practicing public accountancy; or limit the ownership of her firm to other CPAs." J.A. 185.

The Record does not disclose anywhere that Ibanez has not acquiesced as to forms of remuneration or as to the ownership of her law firm; indeed, there was no evidence in the Record as to these two actions that the Board is apparently imputing to Ibanez. As to Ibanez' firm, which all parties agreed is a law firm, there is no evidence in the record as to why she should license the law firm as a CPA firm.

Thus, the Board's finding that Ibanez has "failed to acquiesce" with the requirements of Chapter 473, is not supported by the record, insofar as the Board does not articulate in what manner she has failed to do so. Specifically, regarding the CPA credential, there is no valid rule of the Board which would prohibit her truthful disclosure thereof.[25]

The Board places undue emphasis on Ibanez' accounting skills, at J.A. 184, attributing them strictly to her work experience while working for a CPA firm, despite the fact that she has earned undergraduate and graduate degrees in accounting.

Additionally, the Board's findings are couched in language that attempts to portray Ibanez in a negative light although the act referred to is perfectly legal and professionally appropriate. For example, at Footnote 7 at

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[25] "Holding out" rule, Rule 21A-20.012 F.A.C., was invalidated effective May 12, 1992, reprinted at J.A. 206.

J.A. 185, the Board refers to Ibanez' use of the CPA credential as "trading on the fact of her licensure as a CPA." Later on at J.A. 189, the Board continues that "use of the title CPA in her advertisements . . . is an inducement to contact respondent (Petitioner) and seek her services thinking that she was a licensee subject to the rules of the Board of Accountancy."

(b) Re: CFP Credential

Regarding the *CFP credential*, the Board states in its Order that the use of the term "CFP", by a CPA licensee, is considered by the Board as inherently misleading. Yet, based on the record, no one has been misled by Ibanez. J.A. 157. The record is also devoid of any empirical data or studies to support this factual conclusion. J.A. 157.

The Order of the Board does not refute or rebut the testimony of the financial planning expert regarding the CFP credential. Finding that CFP is considered by the Board as a specialty designation, the Board applied the *Central Hudson* test to the Board's advertising rule[26]. The Board's legal conclusion consisted of application of the *Central Hudson* test to the Board's ban on CFP. At the outset, the Board found that Ibanez' use of CFP is "inherently misleading." Order at J.A. 193. However, the Order does not explain the Board's rationale on how a

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[26] Rule 21A-24.001 F.A.C., in all parts, but specifically due to the prohibition of the use of the "certified", in Subsection (i) of the Rule at J.A. 208-209.

complete ban of the use of CFP advances a substantial government interest in a reasonable manner.

The Board's Order was officially filed on May 12, 1992, and Petitioner filed a timely appeal thereof with the District Court of Appeal, First District, State of Florida.

F. Decision of the District Court of Appeal, First District, State of Florida

The Florida District Court of Appeal, First District, issued an Order of Affirmance on June 9, 1993. Petitioner timely filed a Petition for Rehearing on June 23, 1993, which was denied, giving rise to the filing of this action for review before the Court.

SUMMARY OF ARGUMENT

The sole issue for determination by this Court is whether the Florida Board of Accountancy's blanket ban on attorney/CPA's truthful and verifiable use of the appellations , "CPA" and "CFP", on her law firm's business card, letterhead, and telephone book listings, violates the attorney's First Amendment right to commercial speech.

The Florida Board of Accountancy's ("BOARD") complaint against Ibanez was initiated upon the Board's receipt of an attorney/yellow pages listing, sent in anonymously, which included Petitioner's name. There was no letter, note or hint of a "complaint" other than a circle around her name. As an attorney whose practice includes corporate and tax law, Petitioner advertises in

the attorney yellow pages that she is an attorney, who also holds CPA and CFP licenses. This valuable, biographical information is conveyed to the public in a discrete and professional manner, by merely appending the credentials CPA and CFP after her name. The totality of the activity that the Board found objectionable, and gave rise to this case, is Ibanez' attorney yellow page listing, at J.A. 4; her business card, at J.A. 5; and her law firms letterhead, at J.A. 6.[27] Ibanez' identification activities are truthful and, as such, cannot be banned by the State.

In its Final Order, the Board punishes Ibanez for her truthful identification of credentials under the guise of regulation of CPA activities. To accomplish this end, the Board hypothesizes that, during the course of her law practice, Ibanez may run afoul of the Board's rules (e.g. the Board's rule against accepting contingency fees, etc.) Based on this, and other irrelevant conjectures, the Board concludes that Petitioner misled the public when she disclosed to her potential and actual law practice clients that she is a "CPA", because she does so in relationship to her law firm which is not a licensed CPA firm. Furthermore, the Board finds that the credential "CFP", which Ibanez discloses in her attorney yellow page listing, is "Inherently misleading." This unfounded conclusion is based on the Board's assertion that financial planning is a specialty of public accounting.

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[27] The law firm letterhead only makes reference to Ibanez' membership in professional organizations, e.g. "Member of AICPA "(American Institute of Certified Public Accountants).

The Final Order of the Board interprets this Court's holding in *Central Hudson*[28], to justify a total ban on Ibanez's truthful disclosure of licenses she lawfully holds. Indeed, in the case of "CPA", the certificate conferred upon Ibanez by the Board clearly authorizes her to append "CPA", the certificate conferred upon Ibanez by the Board authorizes her to append "CPA" after her name. Certificate at J.A. 3. In effect, the Board has subverted the principles articulated by this Court in *Central Hudson*, and its progeny, e.g. *Peel*[29] *and Fane*[30], which protect Ibanez' right to First Amendment commercial expression of biographical data and educational attainments.

In finding that Petitioner is misleading the public through her truthful disclosures, the Board did not point to a single instance where Ibanez has misled anyone. Instead, the Board's Order rested entirely on the testimony of the Board's Executive Director, an employee of the Department of Professional Regulation and Louis

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[28] *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n. of N.Y.*, 447 U.S. 557 (1980) [case in which the Court formulated a four-part analysis to determine if commercial speech may be restricted by the State. To be deserving of Constitutional protection, 1) the speech must concern lawful activity and not be misleading; if so, then restrictions may be imposed if: 2) there is a substantial government interest; 3) the restriction directly advances the asserted government interest; and 4) the restriction is not more restrictive than necessary.]

[29] *Peel v. Attorney Registration and Disciplinary Commission*, 496 U.S. 91 (1990).

[30] *Edenfield v. Fane*, 507 U.S. ___, 113 S.Ct. 1792 (1993).

Dooner, a former member of the Board and "expert witness." Nevertheless, the Board concluded that the public, in general, was misled by the mere act of seeing CPA and CFP appended in Ibanez' name.

Both parties agree that the appending of the CPA and CFP credentials, after Ibanez' individual name, constitutes commercial speech. Commercial speech which consists of merely listing educational attainments, degrees, and/or licenses, deserves substantial First Amendment protection.

As to the CPA credential, this Court has ruled that a mark of recognition which is truthful, and verifiable, provides consumers with valuable information. Thus, it cannot be inherently misleading. Indeed, Ibanez' use of CPA is not even potentially misleading in any context, but especially not in the context that consumers may, and can, infer that CPA is a State-conferred certification. There is simply no empirical evidence to support the conclusion that the public can be misled when disclosing State licensure status.

Ibanez' use of CFP is also constitutionally protected, as commercial speech, because attainments of one's educational attainments and licenses cannot be banned. *Peel, supra.*

Thus, Petitioner asks this Court to reaffirm that commercial speech, consisting of truthful, biographical, and objective facts (i.e. verifiable), cannot be banned without violating Ibanez' First Amendment rights.

ARGUMENT

I. PROHIBITIONS OF COMMERCIAL SPEECH BY PROFESSIONALS ABOUT THEIR QUALIFICATIONS, LICENSES, AND EDUCATIONAL ATTAINMENTS DESERVE SUBSTANTIAL FIRST AMENDMENT PROTECTION AND THE BAN THEREOF DOES NOT MATERIALLY ADVANCE A SUBSTANTIAL STATE INTEREST.

A. Importance of Commercial Speech, as Reaffirmed in *Peel, Fane* and *City of Cincinnati.*

This Court has construed the First Amendment to protect truthful descriptions of the price and terms of routine legal services. *See Bates v. State Bar of Arizona,* 433 U.S. 350 (1977). This Court has also recognized First Amendment protection for speech concerning the ability of professionals rendering services. For example, in *Re R.M.J.,* 455 U.S. 191 (1982), this Court unanimously struck down certain advertising restrictions promulgated by the Missouri Bar including bans on describing areas of practice, listing Courts and states in which the lawyer had been admitted to practice, and the wide-scale mailing of announcement cards.

In *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois,* 496 U.S. 91 (1990), this Court overturned the public censure of an attorney by the Illinois Supreme Court where the attorney had used the letterhead claiming certification as a trial specialist by the National Board of Trial Advocacy. The court ruled that the State could not completely ban disclosure of certification conferred by a private professional organization.

Recently, in *Edenfield v. Fane,* 507 U.S.___, 123 L.Ed.2d 543, 113 S. Ct. 1792 (1993), these protections were extended to certified public accountants. Under the First Amendment, as confirmed by prior decisions of this Court, Petitioner is entitled to advertise and communicate truthful, non-deceptive information. These are types of commercial expression to which the protections of the First Amendment apply and increases the ability of consumers to make informed choices about matters important to them, *Edenfield v. Fane, supra.*

Similarly, *Cincinnati v. Discovery Network,* 507 U.S. ___, 123 L.Ed.2d 99, 111 (1993), reaffirmed the holding in *Bigelow v. Virginia,* 421 U.S. 809, at 822, that "purely factual matter of public interest may claim protection." Furthermore, the Court reminds us not to "understimate the value of commercial speech", *Cincinnati,* at 109.

B. Because Commercial Speech Makes An Important Contribution To Public Welfare, Government Must Make A Substantial Showing To Justify Regulation.

This Court's general approach for determining the constitutionality of restrictions on commercial speech, including the "commercial speech of attorneys," is set forth in *Central Hudson Gas and Electric Corp. v. Public Comm'n,* 447 U.S. 557, 564 (1980). Under that test, commercial speech is entitled to constitutional protection if it is "neither misleading nor related to unlawful activity." If the communication meets that threshold test, it may then be restricted only if (a) the government asserts a substantial interest to be achieved by the restrictions, (b) the

restrictions directly advance the government's asserted interest, and (c) the restrictions are no more extensive than is reasonably necessary to effectuate that interest. *Central Hudson* at 564 and 566.

In *Fane, supra,* at 553, the Court emphasized that once the threshold test is met, i.e., the speech is not misleading and related to a lawful activity, the burden is on the State to justify the restrictions. If the justification advanced by the State is imprecise or not the actual State interest, it is improper for the Court to supplant or interpolate where the State's true interest lies. *Fane, supra,* at 554.

II. THE FIRST AMENDMENT PROHIBITS THE STATE OF FLORIDA FROM PUNISHING IBANEZ BECAUSE SHE PLACED THE CPA DESIGNATION IN HER ATTORNEY LISTING IN THE YELLOW PAGES, ON HER LAW OFFICE BUSINESS CARD AND ON HER LETTERHEAD

A. Ibanez' Use of the CPA Designation is Truthful and Not Misleading.

In *Peel, supra,* the attorney stated on his letterhead that he was certified as a trial specialist by the National Board of Trial Advocacy. 496 U.S. at 6. This Court observed that the facts stated on the letterhead were true and verifiable. Additionally, this Court noted that there was no contention that any potential client or other person was misled or deceived by Peel's stationery. 496 U.S. at 100.

The Board of Accountancy acknowledged that Petitioner was indeed a licensed CPA. Furthermore, the Board acknowledged that Petitioner's CPA certificate

states that she is entitled to append the letters CPA after her name to evidence registration by the Board of Accountancy as a certified public accountant.[31] Therefore, Petitioner's advertisement that she is a CPA is true and verifiable. As such, it is not subject to blanket suppression by the Board.

B. Petitioner's Advertisement That She Is A CPA Is not Potentially Misleading.

In this Court's decision in *Re R.M.J.,* 455 U.S. 191 (1982), the Court stated that although truthful advertising is entitled to the protections of the First Amendment,

> " . . . when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions." 455 U.S. at 203.

In this case, the Board of Accountancy found that Petitioner's use of the appellation "CPA" was inherently misleading.[32] In its Brief in Opposition to Petitioner's Petition for Certiorari, the Board relying on *Friedman v. Rogers,* 440 U.S. 1 (1929) [case declaring that the use of

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[31] In its Final Order, at J.A. 179, the Board accepted this, among other findings of fact, of the administrative hearing officer's Recommended Order.

[32] Because potential clients "would clearly see respondent's use of the titles "CPA" in her advertisements as an inducement to contact Petitioner and seek her services thinking that she was a licensee subject to the rules of the Board of Accountancy." Board Opinion, J.A. 189.

trade names can be misleading because trade names have no intrinsic meaning] seeks the Court's application thereof to Ibanez' case. However, the CPA mark is clearly meaningful and denotes State Licensure status as a licensed CPA. Consequently, a case dealing with trade names, i.e. that have "no intrinsic meaning," 440 U.S. at 12, can have no applicability to Ibanez' listings of her CPA professional credential after her name because her credentials do have intrinsic meaning.

Petitioner is, in fact, a licensee subject to the rules of the Board of Accountancy. There is plainly no risk of misleading the public as a result of Petitioner's use of the CPA appellation because the appellation accurately reflects her licensure as a CPA. Like every licensed CPA in Florida, Ibanez is obviously regulated by the Board. It must be emphasized that this case arose out of a disciplinary proceeding which resulted in Petitioner being reprimanded for disclosing to the public, information, that she was authorized to disclose by the Board itself.[33]

The Board's vague concern regarding the fact that Petitioner's law practice professional association is not licensed as a public accounting firm has no bearing whatsoever on the fact that Petitioner is a certified public accountant entitled to advertise that fact. Similarly, the Board's abstract concern that some member of the public might think that Ibanez' law firm is a licensed public accounting firm does not render Petitioner's use of the appellation "CPA" misleading.

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[33] Refer to Ibanez' Board-conferred CPA certificate at J.A. 3.

The Board's "misleading" theory rests on speculation, and is apparently grounded on the rationale that Ibanez, a practicing attorney, in good standing as a Florida licensed CPA, may one day engage in illegal activity see Board's example: accepting contingent fees on a court case, at J.A. 180. This supposition ignores the fact that Ibanez has not engaged in such activity which puts the Board's Order in the category of punishing Ibanez for anticipated future conduct.

Though the Board insists that Petitioner's practice of law may, in the future, violate CPA rules, this supposition does not invalidate Ibanez' legally authorized use of CPA.

C. The Board Has No Substantial Interest In Totally Suppressing Petitioner's Disclosure Of Her CPA Credential.

The state must assert a substantial interest and the interference with speech must be in proportion to the interest served. *Re R.M.J.*, 455 U.S. at 203, citing *Central Hudson Gas and Electric Corp. v. Public Comm'n*, 447 U.S. 557, 563, 564 (1980). Although the Board of Accountancy asserts that it is obvious that the regulation of the practice of public accountancy is a valid governmental interest (Board's Order at J.A. 186), it is the blanket ban, not the regulation of public accounting in the abstract, which must pass muster on this second prong of the test. Here, the Board has failed to identify any substantial interest in a rule that prohibits a CPA from advertising the fact that she is a CPA. In *Re R.M.J.*, this Court found that the Missouri advisory committee similarly failed to identify

any substantial interest in a rule that totally prohibits a lawyer from identifying the jurisdiction in which he is licensed to practice. The Court stated that such information was not misleading on its face but was instead, factual and highly relevant information. 455 U.S. at 205.

Applying *Central Hudson* to this case, it is apparent the Florida Board of Accountancy has failed to satisfy the second prong, because no substantial government interest has been proven. At this point, the Court's analysis may cease because prongs three and four are contingent on there being a "substantial government interest" asserted. Such an interest is lacking here. However, the analysis will continue assuming, arguendo, that this Court were to find there is a substantial government interest.

D. The Board's Total Ban Of Petitioner's Advertisements Does Not Advance The State's Interest.

The third prong of the *Central Hudson* test is whether the regulation directly advances the governmental interest asserted. *Central Hudson*, 447 U.S. at 566.[34] Elaborating

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[34] Recently, the Court analyzed this third *Central Hudson* factor, in *United States v. Edge Broadcasting*, 509 U.S. ___, 125 L.Ed 2d 345, 113 S. Ct. ___, (1993), a non-attorney advertising case which dealt with a Federal lottery advertising restriction, as applied to prohibit one state's radio station broadcast of legal lottery activities into another state. Therein, the Court agreed that Congress had identified a legitimate government interest in formulating a policy that would balance the interests of lottery states and non-lottery states. Thus, Congress' support of non-lottery states (North Carolina), "by forbidding stations in such a

on the interest to regulate public accounting, the Board claims that such interest is advanced by ensuring:

> " . . . that only an individual who meets certain standards is permitted to call oneself (herself) a CPA", Order at J.A. 187.

In support, the Board cites the case of *Abramson v. Gonzalez*, 949 F.2d 1567 (11th Cir. 1992), which, in essence, prohibits unlicensed individuals from calling themselves licensed.[35] Yet, the Board's position, while in the abstract, has no application to Ibanez. Ibanez is licensed as a CPA. The Board's vague reference to Ibanez' law firm being

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state from airing lottery advertising . . . ", at 125 L. Ed. 2d 356, was found to directly advance the government interest. That case must be distinguished from the instant case, because the asserted government interest of the Board, in ensuring that the general public is not misled, cannot be directly advanced by absolutely prohibiting Ibanez' truthful, verifiable speech.

[35] The Board's reliance on "title acts" which prohibit unlicensed persons from using professional titles is misapplied. *Accountants' Society of Virginia v. Bowman*, 860 F.2d 602 (4th Cir. 1988) (state may prohibit unlicensed accountant from identifying publicly as "certified public accountant," "CPA," or "public accountant"); *Smith v. California*, 336 F.2d 530 (9th Cir. 1964) (state may prohibit unlicensed engineer from identifying publicly as "electrical engineer" or "consulting engineer"). Similarly, in the Board's Order and in its Brief in Opposition to Petitioner's Petition for Certiorari, the Board cites the lower court cases of *Gandee v. Glaser*, 785 F.Supp. 684 (S.D. Ohio 1992) and *United States v. DeFusco*, 930 F.2d 413 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 239 (1991). *Gandee* also deals with prohibited conduct of unlicensed persons. *DeFusco* upheld the right of the United States to prosecute a person for distributing material that misled the people into believing that they won a contest. Neither *Gandee* nor *DeFusco* would serve to deny or negate Ibanez' right to list her professional credentials truthfully.

unlicensed is tantamount to suggesting that Ibanez, the individual, is unlicensed. Furthermore, the Board's references to her law firm should be disregarded as similarly irrelevant, considering that the Board did not charge Ibanez with practicing in an unlicensed CPA firm.[36] The only charge before the Court is the truthful and verifiable use of Ibanez' credentials after her individual name.

Most recently in the *Fane* case, this Court stated the burden of restricting commercial speech is not satisfied by –

> "mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Fane*, at 555.

In this case, the Board did not, in its Order, identify a single individual who had been misled by Petitioner's advertisement of the appellation "CPA." The hearing officer noted that the Board failed to prove that any consumer in Florida had been misled by Petitioner's advertisements. The Board's primary witness was Louis Dooner. Mr. Dooner's conclusionary statement was nothing more than "conjecture" as to the effect of Petitioner's use of CPA designation on the public. In *Fane, supra*, at 556, this Court rejected Mr. Dooner's testimony because it

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[36] Refer to Hearing Officer's Recommended Order (J.A. 170) as to the first count of the Amended Complaint and her Orders dated August 19, 1991 and August 22, 1991 at R. 79 and R. 103, respectively, which clarifies that the Board voluntarily withdrew a charge to such effect.

was based on conjecture. Mr. Dooner's testimony in this case is similarly objectionable.[37] Ms. Martha Willis, Executive Director of the Board, could also not identify any party who had been misled by Petitioner. The Board's third witness, Elise Rice, Professional Regulation ("DPR") employee testified that she did not make a connection between CFP and the practice of public accounting. Significantly, the Board failed to identify a single study or any empirical data to substantiate its abstract concerns.

In light of the foregoing, the conclusion that Petitioner misled anyone was mere "speculation or conjecture" which this Court in *Fane* held to be insufficient to satisfy the burden of justifying a restriction on commercial speech. Accordingly, the third prong of the *Central Hudson* test was not satisfied by the Board of Accountancy, because the Board's asserted interest – ensuring the public is not misled – is not served by banning Petitioner's truthful disclosures of the CPA state licensure appellation.

E. The Board's Order Was More Restrictive Than Necessary

The last prong of the *Central Hudson* test is whether the State's restrictions are more restrictive than necessary to achieve the state's interest. *Central Hudson*, 447 U.S. at 566. As the court explained in *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989), while

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[37] It is significant that the Board would use the same "expert" to suppress the First Amendment rights of attorney/CPAs, as it used to suppress First Amendment rights of CPAs.

this last prong of the *Central Hudson* test does not require the state to use the least restrictive means to achieve its interest, it does require the state to employ "a means narrowly tailored to achieve the desired objective." 492 U.S. at 469, 480. The Board found that because Petitioner's use of the appellation "CPA" was inherently misleading that the "Board's position that a CPA must comply with the statutes and rules, when trading upon the fact of licensure as a CPA, constitutes a "reasonable fit" for constitutional purposes." J.A. at 187.

This conclusion is directly contrary to this Court's ruling in *Fane,* which held that where the prohibitions do not serve the purposes of the state in a direct and material manner, the restriction cannot be, by definition, a reasonable time, place, or manner restriction. *Fane,* 507 U.S. at 557. Accordingly, because the Board's restriction on Petitioner's speech lacks a substantial relationship to the governmental interested asserted,[38] it is not necessary for this Court to consider the fourth prong of the *Central Hudson* test.

Clearly, the order of the Board demonstrates that no consideration whatsoever was given to employing

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[38] In the recent case of *Cincinnati,* at 123 L.Ed.2d 99, 115, (1993) the Court could find no basis for distinguishing between "newspapers" and "commercial handbills", and the distinction bore no relationship to the interest asserted, consequently the Court held that "the city has not established the 'fit' between its goals and its chosen means that is required by our opinion in *Fox.*" Similarly, in the instant case, the Board cannot justify a distinction between CPAs, as opposed to CPA/attorneys, as regards disclosure of their rightfully earned CPA credential.

"means narrowly tailored to achieve the desired objective", such as a disclaimer, other than a total suppression of Petitioner's advertising the CPA mark. The final prong of the *Central Hudson* test was not satisfied by the Board of Accountancy because the ban imposed by the Board cannot be held to advance the Board's interest.

Based on the above, it is evident that the Board cannot meet the *Central Hudson* tests. Thus, Ibanez' use of the CPA credential is commercial speech deserving of full protection under the First Amendment, as applied to the States under the Fourteenth Amendment.

III. THE FIRST AMENDMENT PROHIBITS THE BOARD FROM PUNISHING IBANEZ BECAUSE SHE APPENDS THE CFP DESIGNATION TO HER NAME IN THE ATTORNEY LISTING IN THE YELLOW PAGES, AND ON HER LAW OFFICE BUSINESS CARD AND LETTERHEAD.

A. Ibanez' Earned CFP Credential Is Truthful, Verifiable, and Not Misleading

The Board conducted no in-depth analysis under *Central Hudson* with respect to Petitioner's use of the appellation "CFP." Instead, the Board concluded that Petitioner's use of the designation "CFP" was inherently deceptive and misleading advertising by implying a specialty of public accountancy not recognized by the Board of Accountancy.

The Court's decision in *Peel, supra,* provides the Court with a comparable scenario, due to attorney Peel's truthful disclosure of credentials conferred by a private

organization. As in *Peel*, the IBCFP is a bona fide institution, which through its Federal trademark, "CFP", is the only entity that can use the word "certify" in conjuncture with "financial planning." The IBCFP[39] imposes rigorous education and testing requirements, and requires compliance with rules of ethics.

Nothing in the record supports the Board's contention that CFP implies a specialty of public accounting. Instead it is a discrete discipline. Federal law also contradicts the Board's notion, for it is well established by the Securities and Exchange Commission ("SEC") that anyone who "holds out" to be offering financial planning services is regulated by the Investment Advisers Act of 1940 ("Advisers Act").[40]

The SEC's interpretive release explains that, in addition to the Federal layer of regulation, financial planning, in more than 40 states, is regulated under state registered investment adviser laws. In Florida, Chapter 517, Florida Statutes, is the State counterpart to the Federal investment adviser laws. Although in Florida, attorneys and CPAs are exempt from registering as an "investment adviser when the professional renders such services in connection with the regular practice of his profession . . . "[41], Ibanez is registered not only with the SEC, but also under Chapter 517, Florida Statutes.

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[39] As of February 1, 1994, the IBCFP has changed its name to *"Certified Financial Planner Board of Standards."*

[40] Refer to Investment Advisers Act Interpretive Release #IA-1092 which amends Part 276, Chapter 11 of Title 17 of the Code of Federal Regulations.

[41] Refer to Sec. 517.021(10)(b)1 Fl. St.

Furthermore, in light of the expert witness testimony of Mr. Goss, there can be no doubt that Ibanez' use of CFP is truthful because she holds a CFP license in good standing. Thus, CFP cannot be deemed "inherently misleading" when appended after Ibanez' name, due to its truthful and verifiable nature. As in *Peel, supra*, CFP cannot be absolutely banned under the First Amendment.

B. Ibanez' Use Of *CFP* Is Not Potentially Misleading

Justice Marshall, in *Peel, supra*, at 113, explained the various meanings of the word "certified", specifically:

> "[A] document issued by a school, a state agency, or a professional organization certifying that one has satisfactorily completed a course of studies, has passed a qualifying examination or has attained professional standing in a given field and may officially practice or hold a position in that field." Webster's Third New World International Dictionary 367 (1986 ed.) See also ibid. (defining "certify" as, inter alia, "license").

In *Peel*, the NBTA was a membership entity. In the context of "CFP", the certification is more akin to *educational attainment*, for financial planning is a separate field of discipline. Indeed, the IBCFP has sponsored financial planning programs in more than 44 colleges and universities. The IBCFP is a non-profit organization whose existence is predicated on the credentialing of CFPs, who meet the extensive education and testing requirements imposed by this regulating body.

In *Peel*, the NBTA was considered, by Justice Marshall and other members of the Court, as potentially misleading because the NBTA is not a "commonly recognized organization", as regards the public in general, at 496 U.S. 114. However, the general public has a need for attorneys with financial planning expertise. Many colleges and universities have instituted curricula in financial planning, in coordination with the IBCFP.[42] Thus, the public's need is served by Ibanez' advertising of her CFP designation, conferred by a recognized organization.

Neither Mr. Dooner, nor the Board's executive director, could point to any statistics or studies which link the use of 'CFP', by practicing attorneys, to any public misconception. Neither is there any empirical data to that effect regarding the combined use of CPA, CFP, by a practicing attorney.

Based on the record, including the fact that financial planning is a separate discipline, related under federal and state registered investment adviser statutes, this Court can readily conclude that it is not a specialty of public accounting. Although *Peel* supports Ibanez' position, that case concerned the more troublesome query of specialty which possibly implies a "claim as to the quality of services", *Peel*, 496 U.S. at 114. But that is not the case here.

Petitioner's use of her earned licensure marks, makes no "claim of quality" nor does her use of the CFP credential "propose a commercial transaction", as was the case in *Peel*. Ibanez appends her CFP and CPA credentials

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[42] Refer to Mr. Goss' testimony at J.A. 61-62.

after her name, in a highly professional, discreet and straightforward manner in her attorney yellow page listing and on her law practice business cards.[43] Thus, the speech in question here is purely "passive" speech, which communicates a truthful, verifiable fact.

Where the certification in question denotes qualification in another discipline, which is a relevant, valuable disclosure to attorney Ibanez' clients, the Board cannot impose any restrictions on the use of the CFP designation. If restrictions are permitted, it should be less than an absolute ban. *Peel* at 116.

Even if Ibanez' use of CFP was potentially misleading, in the abstract, then at best the Board could have proposed restrictions so that the CFP information "may be presented in a way that is not deceptive." *Re R.M.J.*, 455 U.S. at 203.

C. The Board Has Not Demonstrated a Substantial Government Interest in Prohibiting the Use of "CFP"

Significantly, the Board's Order is devoid of any government rationale as to what potential harm the Board is trying to prevent. Nor does it explain how an absolute ban advances such interest. Likewise, the transcript of the Board's official meeting, at R. 1305-1359, which decided the Ibanez disciplinary case, is virtually silent as to the CFP issue. This lack of any coherent justification for the total ban is even more intolerable when it is considered

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[43] As to her letterhead, at J.A. 6, the CFP credential is only inferred from the reference to the IBCFP.

that the Board has not banned the use of the CFP term in a uniform manner.[44]

As affirmed by this Court in *Fane*, it is not the Court's function to seek out the government's asserted interest, or to construe it, when it is articulated somewhat vaguely. On the basis of the record in this case, the Board has failed to articulate a government interest, which can be considered either substantial, or valid, to justify its total ban on Ibanez' disclosure of the designation – CFP.

D. The Board's Total Ban of CFP Does Not Advance the Board's Interest, and Is Not a Reasonable Fit

The potential harm, i.e. the notion that the public could be misled by the disclosure of CFP after Ibanez' name, is articulated by the Board at J.A. 194:

> " . . . in the context of an individual practicing public accounting and trading on the fact that she is a certified public accountant, [it] has been determined by the Board to be false, deceptive and misleading advertising by implying a specialty of public accounting, not recognized by the Board of Accountancy."

Prior case law makes clear that a total ban is not a reasonable means to advance such an interest, unless the ban is narrowly tailored to vindicate a substantial state

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[44] The Board granted a CPA/internal auditor of a state government agency, the right to use "CFP" along with his "CPA" designation (see Board opinion to C.M. Williams, dated September 21, 1987, as ratified by the Board on September 30, 1987, at R.372).

interest. *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 480 (1989). The Court has consistently found in favor of disclosure, *Bates v. State Bar of Arizona*, 433 U.S. at 375 ("the preferred remedy is more disclosure rather than less"), and that means that the government may fashion a restriction that provides more information to consumers, but it cannot outlaw all use of CFP. In short, the Court should be guided by the principle it established in *Shapero*,[45] i.e., that consumers of information can best be protected by imposing restrictions that "distinguish [ ] the truthful from the false, the helpful from the false, the helpful from the misleading, and the harmless from the harmful."

The public interest regarding lawyer advertising, is best served by facilitating consumers' access to legal services, which, in turn, would better serve the administration of justice. *Re R.M.J.*, 455 U.S. at 199, 200. The Court reaffirmed this view in *Peel*, 496 U.S. 91, 111, n. 18, when the Court noted that a principal reason why consumers do not consult lawyers is "because they do not know how to find a lawyer able to assist them with their particular problems." (Citing Federal Trade Commission, Staff Report on *Improving Consumer Access To Legal Services: The Case For Removing Restrictions On Truthful Advertising* (1984)).

Accordingly, the Board's ban on the use of CFP cannot withstand the *Central Hudson* analysis, nor does it serve the public interest. Therefore, Ibanez' use of CFP

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[45] *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466, 478 (1988).

deserves full protection under the First Amendment, as applied to the States under the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the judgment and order of the First District Court of Appeal of the State of Florida should be reversed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 30 1994
OFFICE OF THE CLERK

No. 93-639

In The

Supreme Court of the United States

October Term, 1993

SILVIA S. IBANEZ,

Petitioner,

v.

STATE OF FLORIDA,
DEPARTMENT OF PROFESSIONAL REGULATION,
BOARD OF ACCOUNTANCY,

Respondent.

On Writ Of Certiorari To The Florida First District Court Of Appeal

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

Whether the State of Florida's statutory scheme violates the first amendment when it prohibits an employee of a firm that is not licensed as a public accounting firm from holding herself out to the public as a certified public accountant (CPA) when providing accounting and tax services to the public.

Whether the State of Florida's regulatory scheme violates the first amendment when it prohibits certified public accountants (CPAs) who are practicing public accounting from using the term "certified" in connection with self-designations and titles not approved by the Florida Board of Accountancy.

PARTIES TO THE PROCEEDING

The Florida Department of Business and Professional Regulation[1] was the Petitioner in the original administrative action, the Appellee in the Florida District Court of Appeal, First District, and is the Respondent before this Court.

The Florida Board of Accountancy is a regulatory board created within the Florida Department of Business and Professional Regulation. The Board's final order is at issue in this proceeding.

Sylvia S. Ibanez was the Respondent in the original administrative action, the Appellant in the Florida District Court of Appeal, First District, and is the Petitioner before this Court.

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[1] At the time this action was commenced and until July 1, 1993, the Department was the Department of Professional Regulation. Pursuant to Chapter 93-220, Laws of Florida, effective July 1, 1993, the Florida Departments of Professional Regulation and Business Regulation were abolished and their functions merged into the newly created Department of Business and Professional Regulation.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

The Respondent accepts the Petitioner's Statement regarding the constitutional and statutory provisions at issue in this case, with the addition of subsections 473.302(4)(a) and (b), Florida Statutes (1991), which are set out in full in the Appendix to this brief.

STATEMENT OF THE CASE

The Respondent rejects the Statement of the Case as presented by Petitioner because her Statement goes well beyond an objective statement of these proceedings and injects legal argument. Accordingly, the Respondent presents the following Statement of the Case:

The practice of public accounting is defined as performing services for the public which involve the use of accounting skills or management advisory or consulting services by a certified public accountant or any person holding herself out as a certified public accountant.[2] Silvia Ibanez is a certified public accountant who received her license from the Florida Board of Accountancy in 1982. (J.A.3; R.423). While working for the CPA firms of Coopers & Lybrand and Main Hurdman, she performed all aspects of tax practice for both individuals and businesses, including the preparation and review of tax returns; representing clients in Internal Revenue Service ("IRS") audits; and rendering tax opinions and interpretations of the tax code, regulations, rulings and applicable caselaw. (R.470).

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[2] Section 473.302, Fla. Stat. (1991).

Ibanez is also a member of The Florida Bar in good standing and is a Certified Financial Planner certified by the International Board of Standards and Practice for Certified Financial Planners. (R.1223). In her current practice, Ibanez also provides all types of tax services to her clients, including tax opinion work, representation before the IRS, evaluation of the tax consequences of certain transactions, and financial counseling and planning. (R.470, 1225) Indeed, Ibanez testified in the proceedings below that many of the activities performed under the guise of her law firm are identical to those functions she performed while working for CPA firms. (R.464-471, 1225-1226). However, when asked if she was required to register her firm with the Board of Accountancy, she replied, "Not at all. It's a law firm." (R.207) Yet, her testimony indicated her awareness of other, non-accounting firms which had been registered by the Board for use of the CPA designation. (R.209, 210).

Ibanez is listed in the yellow pages of the telephone book under the heading, "Attorneys," as "Ibanez, Silvia, S., CPA, CFP." She is also listed in the white pages of the telephone book as "Ibanez, Silvia S., CPA CFP atty." Ibanez's business card also states, "Silvia Safille Ibanez, JD, CPA, CFP." (R.86, 1123).

On June 13, 1991, the Department of Professional Regulation filed an Administrative Complaint against Ms. Ibanez, alleging violations of Chapter 473, Florida

Statutes, based upon her use of the CPA and CFP designations in the telephone advertisements and on her business card.[3] In an Amended Administrative Complaint as modified by an August 22, 1991, order of the hearing officer, the factual allegations against Ms. Ibanez were in pertinent part:

> 3. Respondent is listed in the yellow pages of the Winter Haven [Florida] area phone book under the heading "attorneys."
>
> 4. This listing in the phone book states "Ibanez Silvia S. CPA CFP."
>
> 5. Respondent is also listed in the white pages of the Winter Haven area phone book.
>
> 6. This listing states "Ibanez Silvia S CPA CFP atty."
>
> 7. The Respondent's business card states "Silvia Safille Ibanez, JD, CPA, CFP."
>
> 8. The Respondent provides or offers to provide services to the public through her firm

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[3] The prosecution of complaints against licensed professionals regulated by the Department is governed by section 455.225, Fla. Stat. Hearings are governed by the provisions of the Florida Administrative Procedures Act, Chapter 120, Fla. Stat. In this case, Ibanez chose a formal hearing pursuant to section 120.57(1), Fla. Stat. (R-4). Section 120.57(1) requires that a hearing officer assigned by the Department of Management Services, Division of Administrative Hearings act as a fact-finder. The hearing officer submits a recommended order to the agency, in this case the Board of Accountancy, for final action. While agencies can only reject findings of fact under very narrow circumstances, they are free to reject conclusions of law. See Fla. Stat. § 120.57(1)(b)10; *Major v. Department of Professional Regulation*, 531 So. 2d 411 (Fla. Dist. Ct. App. 1988).

called Silvia S. Ibanez, P.A., which firm is not licensed by the Florida Board of Accountancy.

9. The Respondent holds herself out to the public as a CPA in this unlicensed firm by appending the CPA designation after her name.

10. Based on Respondent's listing in the phone book and on her business cards, an uninformed person may not be able to differentiate whether she is in the practice of public accounting.

* * *

14. The Respondent appends the certified financial planner (CFP) designation along with the CPA designation after her name in the phone book and on her business cards.

(R.32-34). Based on these allegations, Ibanez was charged with violating subsections 473.323(1)(a), (f), (g) and (h), Florida Statutes, and Rules 21A-20.012 and 21A-24.001, Florida Administrative Code. (R.33).[4]

On May 10, 1991, Ibanez filed a separate petition pursuant to section 120.56, Florida Statutes, challenging the validity of Rule 21A-20.012, Florida Administrative Code, one of the rules upon which the disciplinary proceeding was based. (R.1221). As noted by the hearing officer who heard both cases, testimony and exhibits from the rule challenge were adopted into the record in the disciplinary proceeding. (R.1227). Ibanez also filed an

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[4] While the hearing officer struck paragraph eleven and the charges in Count I relating to that paragraph, paragraphs eight and nine were left intact. The allegations in the Amended Administrative Complaint are consistent with the Department's More Definite Statement. (R.99-102).

action in federal district court pursuant to 42 U.S.C. § 1983. *Silvia Ibanez v. Board of Accountancy, et al.*, No. 91-40471WS (N.D. Fla.).

Throughout the disciplinary proceedings, Ibanez maintained that she is not practicing public accounting and most importantly, that the Board of Accountancy has no jurisdiction over her. (J.A.69-70; R.179-193). John Sullivan, a CPA/attorney that testified on Ibanez's behalf, echoed this sentiment. While acknowledging that the public has a right to believe that a person using the CPA designation is subject to state regulation, Sullivan opined that if an attorney/CPA negligently prepares tax returns in his law practice, only The Florida Bar would have disciplinary jurisdiction to deal with the negligent conduct. (R.542-545).

During the formal hearing, Ibanez also admitted that she held herself out to the public as a CPA. (R.190, 426, 649). Indeed, Ibanez stated during her testimony that her clients consider it "extremely valuable" that she is a CPA and that she considers it valuable to her practice to be able to continue advertising that she is a CPA. (R.422, 522).

After consideration of the testimony and exhibits presented at formal hearing, on January 15, 1992, the hearing officer submitted a Recommended Order to the Florida Board of Accountancy recommending that the Board find that Ibanez is not holding herself out as a certified public accountant and finding her not guilty of the violations charged. (J.A.147-174; R.1247-1248). In the Recommended Order, however, the hearing officer found that Ibanez used her CPA designation in advertisements

in the yellow and white pages and on her business cards as charged by the Department. (J.A.151; R.1224). The hearing officer found that Ibanez's "intent in appending the CPA and CFP credentials . . . to her own name is to indicate [presumably to the public] that she is, in her own right, individually licensed as a CPA and CFP." (J.A.154; R.1227). The hearing officer also stated:

> The use of the term "CPA" implies a specific competency to the public. The fact that Ibanez is a CPA is valuable to her legal clients. CPA status is a valuable property right to each CPA, and the ability of the practicing attorney to publicize the fact that s/he holds an active CPA license is a valuable asset to that individual.

(J.A.153; R.1226).

In addition, the hearing officer concluded that, since 1982, the Board has consistently issued informal opinions that the designation "certified financial planner" is an accountancy specialization which has not been approved by the Board. She also noted that the Board held that the "CFP" designation could not be displayed by CPA licensees on stationary or in yellow pages listings in conjunction with the CPA designation. (J.A.157; R.1230). The hearing officer however did not find that use of the CFP designation in conjunction with CPA was a violation of the law.

On April 23, 1992, the Board considered the Recommended Order of the hearing officer. The Board accepted all of the Findings of Fact recommended by the hearing officer, with the exception of paragraphs 13, 21, 23, and 27, and the second sentence of paragraph 7. The Board rejected those recommended findings as they called for

legal conclusions rather than findings of fact. The Board also struck the next to last sentence of paragraph 24 as being incorrect because the Board has a rule which partially addresses the issue therein addressed. (J.A.179; R.1360-1361).

The Board rejected the conclusions of law recommended by the hearing officer and found that Ibanez is holding herself out as a certified public accountant and is engaged in the practice of public accountancy. Accordingly, the Board found violations of subsections 473.323(1)(a), (f), (g), and (h), Florida Statutes and Rule 21A-24.001, Florida Administrative Code. Ibanez was issued a reprimand. See section 473.323(3), Florida Statutes. (J.A.194; R.1377). The Board's order discussed at length the definition of public accounting and stated:

> To the extent therefore, however, that a CPA is providing one or more types of accounting skills and management advistory [sic] services to the public, and at the same time holding himself or herself out as a CPA, such an individual is practicing public accounting. Any other construction of the definition of the practice of public accounting would permit individuals, engaged in offering accounting services to the public and holding the CPA license, to trade upon the fact of their licensure, and to advertise that fact, while not being subject to the statutes and rules governing CPAs in the State of Florida. It is difficult to conceive how, to the extent Chapter 473 is a Title Act, it could legitimately be said to protect the public health, safety and welfare, if individuals who trade on that Title in commerce while using their accounting skills for

> the public, are not subject to the jurisdiction of the Board of Accountancy.

(J.A.183; R.1364-1365) (footnote omitted).

The Final Order of the Board also considered the Board's interpretation of Chapter 473 and the rules promulgated thereto in light of *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). The Board concluded that generally the use of the CPA designation is commercial speech and not illegal or inherently misleading but that under the facts of this case, use of the designation is inherently misleading; that the regulation of the practice of public accounting is a vital governmental interest; that the statutes and rules in question further the governmental interest by ensuring that only those who meet certain standards can call themselves CPAs; and that the provisions are a "reasonable fit," in that the regulation simply requires that those who hold themselves as CPAs and who provide public accounting services remain subject to the State's licensure and regulation. (J.A.186-188; R.1368-1370).

With respect to the use of the CFP designation, the Board found that the use by a CPA of any of the terms, such as CFP, set forth in Rule 21A-24.001(1)(i), when those terms have not been approved by the Board, is inherently misleading. The Board noted that no request for Board approval of the CFP designation has ever been made, either by Ibanez or by the organization which awarded her the certification. (J.A.194; R.1376).

Ibanez appealed the Final Order of the Board to the District Court of Appeal, First District, State of Florida. The district court affirmed the Final Order of the Board,

without opinion, on June 9, 1993. (J.A.196). Rehearing by that Court was denied July 28, 1993. (J.A.198).

SUMMARY OF THE ARGUMENT

Ibanez petitions this Court asserting that the Florida Board of Accountancy has imposed a "blanket ban" on the use of the terms CPA and CFP by an attorney/CPA in her law firm's business cards, letterhead, and telephone listings. This "ban," Ibanez claims, violates her right to commercial speech under the first amendment.

The restrictions on the use of both appellations do not amount to a total ban on their use and do not run afoul of first amendment protections.

The State of Florida regulates the practice of public accounting through Chapter 473, Florida Statutes, and Chapter 21A, Florida Administrative Code. With the exception of the attest function, Chapter 473 is a "Title Act," meaning some functions performed by certified public accountants can also be performed by people who are not licensed. Those unlicensed persons, however, cannot hold themselves out as CPAs.

The practice of public accounting is defined as offering to perform or performing one or more types of services using accounting skills or management advisory or consulting services while holding out to the public as a certified public accountant. The State of Florida restricts the advertisement of the use of the term CPA to those licensees who are in compliance with the provisions of Chapter 473. Ibanez is practicing public accounting as

defined in Chapter 473 but asserts that she is not bound by the regulatory provisions governing the license she advertises. Accordingly, the Board is correct in determining that her advertisement of the use of CPA is inherently misleading and not subject to protection under the first amendment.

The Board's restriction on the use of the CPA designation is also permissible under the standards enunciated by this Court in the *Central Hudson* test, in that the asserted governmental interest of regulating the practice of public accounting is substantial; the restriction of directly advances the governmental interest by requiring compliance with the provisions of Chapter 473 which are designed to protect the health, safety and welfare of the public; and the restriction represents a reasonable fit between the need to regulate the practice of public accounting and ensuring that the advertisement of the designation is not misleading.

Further, Fla. Admin. Code r. 21A-24.001 (1991) contains two methods short of a ban for the use of the term CFP. The first is to obtain approval from the Board for its use, which Ibanez chose not to do. The second is to provide a disclaimer concerning the use of the appellation which Ibanez's advertising does not contain. The final order of the Board of Accountancy should be affirmed.

ARGUMENT

I. THE STATE OF FLORIDA'S REGULATION OF THE PRACTICE OF PUBLIC ACCOUNTING DOES NOT VIOLATE THE FIRST AMENDMENT.

A. The State of Florida Regulates the Practice of Public Accounting Through the Use of a Title Act.

Florida has regulated the practice of public accountancy since 1938. In *Heller v. Abess*, 134 Fla. 610, 184 So. 122 (1938), the Supreme Court of Florida held that the profession of public accounting was sufficiently charged with public interest to justify legislation providing for the registration of accountants and prohibiting the practice of accountancy as a CPA in Florida without state certification. *See also United States v. Arthur Young & Co.*, 465 U.S. 805, 817-821 (1984), *cert. denied*, 466 U.S. 936 (1984); *Accountant's Society of Virginia v. Bowman*, 860 F.2d 602 (4th Cir. 1988); *Mercer v. Hemmings*, 170 So. 2d 33, 39 (Fla. 1964). Accordingly, the Florida Legislature enacted Chapter 473, Florida Statutes, and the Florida Board of Accountancy promulgated Chapter 21A, Florida Administrative Code. Together these chapters regulate the practice of public accountancy in the State of Florida.

With the exception of the attest function[5], Chapter 473 is a "Title Act," meaning that other activities of

[5] Attest function refers to the process by which a CPA scrutinizes financial statements prepared by an entity and expresses an opinion as to whether the entity's financial position and results of operation are fairly presented in accord with generally accepted accounting principles.

certified public accountants are activities which can be performed by non-CPAs. As a Title Act, Chapter 473's sole purpose is to insure minimum competence and to protect the public from dishonest practitioners. This is accomplished by assuring the public that when the services of a CPA are used, the CPA is and will be subject to the technical, educational, and other licensure requirements established by the Florida Legislature and the Board of Accountancy. These standards provide for the independence, objectivity, and integrity of CPAs in the provision of accounting services. The Board reasoned:

> As was noted in *Abramson v. Gonzalez*, 949 F.2d 1567 (11th Cir. 1992), as well as *Smith v. California*, 336 F.2d 530 (9th Cir. 1964), the function of a Title Act is not to preclude individuals who *are not* licensed from performing a certain set of tasks, but rather to let the public know that those individuals who *are* licensed have met, and continue to meet, the standards set out by the legislature and the appropriate regulatory boards through statutes and rules.

(J.A.181; R.1363) (emphasis in original).

While Petitioner views the CPA as an attainment, it is not. Far more than merely a recognition of having passed the CPA exam, the designation represents a license granted by the State of Florida and the continued regulation of the professional holding that license.[6] By

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[6] Indeed, Ibanez's business card states "J.D." in addition to or instead of "attorney." The difference goes to the crux of this case in that one appellation implies educational attainment and the other implies a licensure regulation. While listing the attainment of a degree is truly biographical, advertising one's CPA status represents continued state regulation.

accepting the license as a CPA from the State of Florida, Ibanez accepts the responsibility to adhere to the provisions of Chapter 473, Florida Statutes and Chapter 21A, Florida Administrative Code. These provisions include, for example, technical standards (Fla. Stat. § 473.315 (1991) and Fla. Admin. Code r. 21A-22); prohibitions on the use of commissions and contingency fees (Fla. Stat. § 473.3205 and § 473.31 (1991)); licensure of partnerships corporations and compliance with the rules promulgated thereunder (Fla. Stat. § 473.309 and § 473.3101 (1991)); and adherence to disciplinary provisions (Fla. Stat. § 473.323 (1991)). If she chooses to practice public accounting and to hold herself out as a CPA, Ibanez cannot select those provisions which she finds convenient to follow and ignore the rest. She must follow them all.

B. The State of Florida Defines the Practice of Public Accounting as Providing Services Involving the Use of Accounting or Management Advisory or Consulting Services to the Public While Holding Out to the Public That the Provider is a Certified Public Accountant ("CPA").

The practice of public accounting is defined in Florida as:

> (a) Offering to perform or performing for the public one or more types of services involving the use of accounting skills, one or more types of management advisory or consulting services, by a certified public accountant, or firm of certified public accountants, of this state, including the performance of such services in the employ of another person; or

> (b) Offering to perform or performing for the public one or more types of services involving the use of accounting skills, or one or more types of management advisory or consulting services, by any other person holding himself or itself out as a certified public accountant or a firm of certified public accountants, including the performance of such services by a certified public accountant in the employ of a person so holding himself or itself out.

Fla. Stat. § 473.302(4)(a) and (b) (1991). The Florida Board of Accountancy has further defined the practice of public accounting to exclude from the definition those CPAs who do not hold themselves out to the public as certified public accountants. Fla. Admin. Code r. 21A-20.011 (1991). "Holding out" has been defined as engaging in advertising or a course of conduct to inform the public. *Evans v. Hoyme*, 105 N.W.2d 71, 75 (S.D. 1960); *Rogers v. State*, 487 So. 2d 57 (Fla. Dist. Ct. App. 1986).

The definition therefore requires two separate elements: (a) the provision of accounting or management advisory services to the public, and (b) the holding out to the public as a CPA providing these services. In the case before this Court, Ibanez has admitted to both elements of engaging in the practice of public accounting. (R.180, 426, 461, 464-466, 470, 1223-1226).

Ibanez currently holds a CPA license from the State of Florida and prior to her admission to The Florida Bar, was employed as a CPA by the public accounting firms of Coopers & Lybrand and Main Hurdman. (R.1223-1226). While employed at Coopers & Lybrand, Ibanez worked in

its auditing and tax departments and occasionally performed management consulting. At Main Hurdman, she worked as a tax supervisor and financial planner. Ibanez testified that in performing public accounting services with these firms, she was involved in all phases of tax practice, including tax preparation, the review of tax returns, the representation of clients before the IRS, the preparation of tax opinions, and the interpretation of applicable caselaw in different tax areas, including estate planning. (R.470). Ibanez acknowledges that all of these activities were performed in her role as a CPA. (R.1223-1226).

Ibanez also testified that in her current practice, she provides all types of tax services, including preparation of tax opinions, representing clients before the IRS, evaluating the tax consequences of specific transactions, and providing her clients with financial planning and counseling. (R.470-71, 1225). These services require that she analyze financial statements and give opinions based thereon. (R.460). Not only are these the services she previously provided as a CPA in her public accounting firms, they are services which Ibanez admits utilize her accounting education and skills. (R.461, 464-466, 1225).

Ibanez admits that she is holding herself out to the public as a CPA when providing these public accounting services in her current professional practice. When so asked, Ibanez stated, "So, if you're asking me am I holding out as a CPA – for identification purposes, yes, I identify to the world I am a CPA." (R.180, 426, 649). She also testified that her clients considered it "extremely valuable" that she have an active CPA license and that it

was valuable for her to hold herself out to the public as a CPA:

> It is a series of things. For example, when I do representational work before IRS most of the clients that come to me and want an attorney for representation before the IRS they find that the fact that I hold a CPA license and worked for many years as a public accountant makes me – endows me with the ability to really understand the tax returns in question so that I can discuss and defend the legal principles and advocate my client's position. So they feel that is an enhancement, that educational baggage or those educational marks that I have earned and worked so hard for.

(R.442-423; see also R.456, 522).

Ibanez's advertisements in the telephone book and on her business cards communicate to the public that she is currently licensed as a CPA and is in compliance with the related technical and educational requirements. To every member of the public who sees these advertisements, she is holding herself out as being a competent CPA in good standing to provide public accounting services.

Her previous testimony and behavior, however, refute that representation. As stated in the Final Order of the Board of Accountancy,

> [Ibanez] is unwilling to acquiesce in the requirements of Chapter 473 and Chapter 21A, F.A.C., by complying with those requirements. She does not license her firm as a CPA firm; forego certain forms of remuneration denied to

> individuals who are practicing public accountancy; or limit the ownership of her firm to other CPAs. Respondent places the term "CPA" after her name on her business cards and letterhead, and in the yellow pages of the telephone directory all of which, by any standard, must be considered advertising. Respondent further offers services to the public which, by her own admission, involve the use of the same accounting skills she used when she was performing accounting services in a CPA firm by so doing. Respondent has, in effect, told the public that she is subject to the provisions of Chapter 473, and the jurisdiction of the Board of Accountancy when she believes and acts as if she is not.

(J.A.185; R.1367) (footnotes omitted). In her testimony below, Ibanez stated that she is not practicing public accounting and that the Board has no jurisdiction over her. (R.182). However, in her brief before this Court, she states:

> Petitioner is in fact, a licensee subject to the rules of the Board of Accountancy. . . . Like every licensed CPA in Florida, Ibanez is obviously regulated by the Board. . . . [who] reprimanded [her] for disclosing to the public, information, that she was authorized to disclose by the Board itself.

(Petitioner's brief at 28). Thus, her disagreement with the Board has mutated from one of not being subject to regulation by the Board to having her first amendment commercial speech right impaired.

C. The State of Florida Restricts the Use of the CPA Designation to Those Licensees Who Conform to the Requirements of Chapter 473, Florida Statutes, and the Rules Regulating the Profession.

Petitioner asserts before this Court that the State of Florida has imposed an absolute ban on her ability to advertise her CPA status and that this ban fails to meet constitutional standards. Petitioner mischaracterizes the nature of the State's action. There is no ban on the use of the CPA credential by a CPA. This Court has acknowledged in *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91 (1990), that a state may impose measures short of a total ban of commercial speech. As stated in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976):

> Obviously, much commercial speech is not probably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.

Florida reasonably restricts the use of the CPA designation to those licensees who are practicing public accounting, such as Ibanez, and who also comply with the other requirements of Chapter 473. As noted in the Board's Final Order, Ibanez does not. Indeed, it is only her refusal to comply with these requirements, such as licensing her

firm with the Board, that compels the restriction of her use of the CPA designation.[7]

Moreover, the restriction on the use of the term CPA to those who comply with the provisions of Chapter 473 is a reasonable restriction which satisfies the requirements of the test enunciated by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U. S. 557, 566 (1980) and its progeny:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must

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[7] While Ibanez argues that her failure to license her firm is irrelevant because the Department did not charge her with practicing through an unlicensed firm, her argument overlooks the allegations in the Amended Administrative Complaint which were left intact by the hearing officer. The Department asserted that Ibanez was providing services and holding herself out to the public through her firm which was not licensed by the Florida Board of Accountancy. (R.32-34). These assertions were not struck by the hearing officer and were considered by the Board. Indeed, the Board in a footnote in its Final Order stated:

> [7]It is to be noted that Respondent could have simply been charged with practicing public accountancy through an unlicensed corporation in violation of Sections 473.309, 473.3101 and 473.323(1)(a), F.S. Notwithstanding this fact, since the ultimate issue in this cause must be whether or not Respondent is indeed practicing public accountancy by offering accounting services and using accounting skills while trading on the fact of her licensure as a CPA without complying with the provisions of Section 473 and the rules promulgated thereto, and thus deceiving or misleading the public, it is appropriate to approach these alleged violations in the context of deceptive or misleading advertising.

(J.A.185; R.1367).

> determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Under the first part of the *Central Hudson* analysis, the use of the designation "CPA" by a certified public accountant who holds an active individual license is generally not illegal or inherently misleading, and the Final Order below so noted. (J.A.186; R.1368). However, the Board found that the use of the CPA designation under the facts of this case, where the licensee is unwilling to comply with the provisions of the Title Act under which the license was granted, is inherently misleading and may be prohibited. *See Accountant's Society of Virginia v. Bowman*, 860 F.2d at 605-606. Therefore, under *Central Hudson*, the expression may not be protected under the first amendment.

In her brief on the merits, Ibanez summarily dismisses any discussion of *Friedman v. Rogers*, 440 U.S. 1, *reh'g denied*, 441 U.S. 917 (1979), because that case deals with trade names, which the Court reasoned had no intrinsic meaning. Ibanez asserts that *Friedman* is distinguishable because her use of the CPA designation after her name has an inherent meaning. Ibanez's reading of *Friedman* is too narrow. The focus in *Friedman* was on the potential for deception. This Court stated, "Because these

ill-defined associations of trade names with price and quality information can be manipulated by the users of trade names, there is a significant possibility that trade names will be used to mislead the public." 440 U.S. at 12-13. Likewise, Petitioner's decision to selectively comply with the provisions of Chapter 473 while holding out that she is governed by all of them is also inherently misleading.

The State's restriction on the use of the CPA designation meets the second question of the analysis in that the regulation of the practice of public accountancy is not only a valid governmental interest, but a vital one. *United States v. Arthur Young & Co.*, 465 U.S. 805, 817-821 (1984); *Mercer v. Hemmings*, 170 So. 2d 33 (Fla. 1964). Indeed, unlike the situation in *In re R.M.J.*, 455 U.S. 191 (1982), where no substantial governmental interest was articulated, Ibanez conceded the merit of the governmental interest before the Florida District Court of Appeal, First District. In her Amended Initial Brief before that court she asserted, "The BOA also argues, *with which we concur*, that the second prong is satisfied insofar as the asserted governing [sic] interest, i.e. to regulate the practice of public accounting, is substantial." (Appellant's Amended Initial Brief at 32; emphasis added). Ibanez now seeks to change the focus of inquiry, asserting that the State has no substantial interest in "totally suppressing Petitioner's advertising of her CPA credential." (Petitioner's Brief at 29).

Once again, there is no total ban on her use of the CPA credential. Rule 21A-24.001, Florida Administrative Code does not create a blanket prohibition on a CPA advertising her licensure status. Such an advertisement is

permissible where it is not fraudulent, false, deceptive or misleading. The State's continued regulation ensures that CPAs provide accounting services in a competent, professional and ethical manner and that the public is aware that violations of professional standards will be addressed. Clearly, the State has a substantial interest in ensuring that only those persons who subject themselves to the regulation of the practice of public accounting may advertise their licensure status. In order to assert her CPA status, Ibanez need only comply with the provisions of Chapter 473.

Although Ibanez asserts the lack of a valid governmental interest under the second question posed in the *Central Hudson* test, her assertion is more appropriately considered as a challenge to the third inquiry, whether the regulation directly advances the governmental interest asserted. 477 U.S. at 566. As noted previously, Ibanez conceded the validity of the governmental interest at stake. The restriction of Ibanez's advertising her CPA status until she complies with the requirements of Chapter 473 clearly meets the third requirement under *Central Hudson*.

This Court in *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 108 (1990), reiterated that "disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information." However, the issue that was not presented in *Peel* is now before this Court: whether the State's substantial interest in the regulation of the practice of public accountancy is served by regulating the disclosure of licensure

status when the licensed individual refuses to be bound by the regulatory requirements associated with licensure.

Publication of one's licensure as a CPA not only signifies having met certain educational, examination and experience requirements, but also signifies continued regulation and licensure of the CPA by the State through the Board of Accountancy. Only through this continued regulation can the State ensure that CPAs provide accounting services in a competent, professional manner. By requiring CPAs to submit to continued regulation in order to advertise licensure status, Florida is acting in a direct and causal manner to further its interest in ensuring that those CPAs who hold themselves out to the public as practicing public accounting are in fact competent to do so. Holding oneself out as a CPA not only represents that the individual has a license to practice granted by the State, but also that the licensee is subject to sanctions by the appropriate regulatory board for any deficiencies in the practice of the profession.

By contrast, Ibanez's interpretation of law would exempt her from any disciplinary action for any negligence she might commit while performing public accounting services. For example, an attorney/CPA is retained by a client because of her dual licensure, for the purposes of representation before the IRS. Her representation is grossly negligent, demonstrating a lack of understanding of the tax code and the applicable regulations. Under Ibanez's interpretation of the regulatory scheme, only the Florida Bar would have any jurisdiction to take disciplinary action against the attorney/CPA, leaving her license as a CPA unblemished and allowing the licensee to set up a CPA firm providing the same grossly negligent

service for which The Florida Bar disciplined her. Despite her advertisement of her CPA status, the Florida Board of Accountancy would be powerless to respond to any complaint the client may file with the Department. Such an interpretation makes the claim of state licensure misleading and would undermine any regulation of public accounting the State might undertake. Indeed, it also runs afoul of the Department's statutory mandate to investigate and prosecute legally sufficient complaints against licensees. Fla. Stat. § 455.225(1)(1991). The Department's interpretation of the regulatory scheme would subject the attorney/CPA to discipline by both licensing authorities. Such a reading would effectuate the protections afforded the public by both regulatory bodies.

Ibanez dismisses applicability of cases such as *Accountant's Society of Virginia v. Bowman*, 860 F.2d 602 (4th Cir. 1988) (state's prohibition of the use of title "public accountant" by non-CPA permissible) and *Gandee v. Glaser*, 785 F. Supp. 684 (S.D. Ohio 1992), because they deal with the conduct of unlicensed persons. However, the function of a title act such as Chapter 473 is not to prevent individuals who are not licensed from performing certain functions, but to inform the public that those individuals who are licensed have met and continue to meet the standards set out by the Legislature and the appropriate regulatory boards. To the extent that Ibanez seeks to trade on the CPA designation to obtain professional employment without complying with the provisions that regulate the practice she advertises, her status is analogous to that of an unlicensed individual.

Petitioner also summarily dismisses this Court's recent decision in *United States v. Edge Broadcasting*, 509

U.S. ___, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993), by simply saying that the asserted governmental interest of the Board cannot be directly advanced by absolutely prohibiting Ibanez's truthful, verifiable speech. To the contrary, the interest of the Board in regulating the practice of public accounting is directly advanced by requiring licensees to comply with the provisions of Chapter 473 in order to advertise their CPA status. As noted in *Edge Broadcasting*, the issue of whether the regulation directly advances the governmental interest cannot be answered by limiting the inquiry to whether the interest is directly advanced as applied to a single person or entity. The regulation must be viewed in light of the overall goal to be accomplished. 113 S.Ct. at 2705. As stated previously, the goal of the regulation of the practice of accountancy is to maintain the competency of the profession and to protect the public from dishonest practitioners. See Fla. Stat. § 473.301 (1991). Requiring compliance with the provisions of Chapter 473 in order to advertise one's CPA status encourages compliance with the regulatory scheme as contemplated by the legislature. Thus, the policy decisions regarding what regulatory measures will protect the public are left in the hands of the legislature and the Board. The alternative is to allow individual licensees to selectively determine what measures will protect the public based upon their determination of how convenient compliance may be.

In this case, the Board's restriction on the use of the appellation satisfies the inquiry whether it is viewed in isolation or as applied to Ibanez. In addition to the testimony of Louis Dooner referenced by Ibanez, John Sullivan, an attorney/CPA, testified that the public has a

right to believe that a person using the CPA designation is subject to state regulation. (R.542). John Rowe, former president of the Florida Institute of Certified Public Accountants, also testified that

> in a case where a CPA is in public practice and offering his or her services to the public, the CPA – I mean, the public has an interest in knowing whether the person is a CPA or not, and whether they are, in fact, practicing public accounting, being subject to the laws, regulations, and the ethical provisions of the profession.

(R.580). Dean Dennison, Chairman of the Board agreed, stating that the use of the CPA designation carries with it an additional responsibility and that the public has a right to expect a licensee to be accountable under that license. (R.670, 674).

Yet Ibanez testified that she personally is not required to comply with the provisions of Chapter 473. (J.A.69-70; R.179-193). Furthermore, while Ibanez asserts that the record is devoid of any evidence that anyone was misled by her advertisements, this Court has held that where the possibility of deception is self-evident, the state need not survey the public for factual support. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 652-653 (1985).

Requiring compliance with the provisions of Chapter 473 directly advances the Board's goal of regulating the practice of public accountancy but is also no more restrictive than necessary to achieve the State's interest. *Central Hudson*, 447 U.S. at 566. As this Court has noted, there

must be a "fit" between the restriction and the governmental interest "that is not necessarily perfect, but reasonable." *Edge Broadcasting*, 113 S.Ct. at 2705; *see also Edenfield v. Fane*, 507 U.S. , 113 S.Ct. 1792, 1798, 123 L.Ed. 2d 543 (1993); *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989); *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986). This Court further stated that

> the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interest in an individual case.

Edge Broadcasting, 113 S.Ct. at 2705, *quoting Ward v. Rock Against Racism*, 491 U.S. 781, 801 (1989). As articulated in the Final Order of the Board,

> The statutes and regulations in question, which simply require that individuals, who trade on the fact of their licensure as CPAs while offering accounting skills and services to the public, must comport with the rules and regulations governing the practice of public accounting, is a "reasonable fit" between the public good, i.e., the knowledge that any individual trading on the fact they are [a] CPA, will be regulated by the public and agency in question, and the limitation on individual licensee's rights to call oneself a CPA while not complying with the requirements of the statute.

(J.A.187; R.1369-1370).

Petitioner asserted below that the goals of the Board could be met by the use of a verbal disclaimer to her clients that she was not practicing public accounting

despite her use of the designation. Such an assertion ignores the finding of the Board, which was affirmed by the district court of appeal, that Ibanez is in fact practicing public accounting, as defined by section 473.302, Florida Statutes and interpreted by the Florida Board of Accountancy.[8] Therefore, such an assertion would not be truthful. Further, even assuming that Ibanez was willing to inform her clients that she was not in compliance with the provisions of Chapter 473 and considered herself to be exempt from disciplinary action by the Board for any negligent acts she might commit, such conduct would undermine the entire regulatory process for a title act such as Chapter 473.

Requiring Ibanez to comply with the provisions of Chapter 473 is the prerequisite for her to claim the benefit from which she seeks to profit. Her ability to comply is evident from the record, wherein Ibanez herself acknowledged that many "law" firms are registered with the Board of Accountancy. (R.207, 224, 553, 685). Requiring this compliance demonstrates a reasonable fit between the asserted governmental interest of regulating the practice of public accounting and her right to advertise as a licensee governed by those regulations. Because Rule

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[8] Under Florida caselaw, an agency charged with enforcement of a statutory provision has the principal responsibility for interpreting that provision consistent with the intent of the legislature. A reviewing court must defer to an agency's interpretation of the law where that interpretation is consistent with legislative intent and is supported by competent, substantial evidence. *Public Employees Relations Comm'n v. Dade County Police Benevolent Ass'n*, 467 So.2d 987 (Fla. 1985); *see also Manasota 88, Inc. v. Tremor*, 545 So.2d 439 (Fla. Dist. Ct. App. 1989).

21A-24.001 and the statutes it implements are a reasonable restriction on the use of the CPA designation, the decision of the First District Court of Appeal should be affirmed.

II. THE STATE OF FLORIDA'S REGULATION OF THE TERM "CERTIFIED" DOES NOT VIOLATE THE FIRST AMENDMENT.

A. The State of Florida's Restriction of the Use of the Term CFP When the Term is Used by CPAs Does Not Violate the First Amendment.

Petitioner's advertisements also use the term "CFP," (Certified Financial Planner) in connection with her use of the appellation "CPA." Rule 21A-24.001(1)(i)-(j), Florida Administrative Code, provides:

> (1) No licensee shall disseminate or cause the dissemination of any advertisement which is in any way fraudulent, false, deceptive, or misleading, if it, among other things:
>
> . . . .
>
> (i) States a form of recognition by any entity other than the Board that uses the terms "certified," "public," "auditor," or "auditing" however, this would not prohibit a licensee from disclosing that he is a CPA in another state or jurisdiction; or
>
> (j) States or implies that the licensee has received formal recognition as a specialist in any aspect of the practice of public accounting, unless the statement contains a disclaimer stating that the recognizing agency is not affiliated

> with or sanctioned by the state or federal government. The advertisement must also contain the agency's requirements for recognition, including, but not limited to, educational, experience and testing. These statements must be in the immediate proximity of the statement that implies formal recognition as a specialist.

The Board concluded that the use, by a CPA, of any of the terms set forth in Rule 21A-24.001(1)(i), when those terms have not been approved by the Board, is inherently misleading. The Board stated,

> "[C]ertified", when used in conjunction with public accountancy, means state licensure or approval. See *Peel v. Attorney Registration and Disciplinary Commission*, ___ U.S. ___, 110 S.Ct. 2294-95, (1990), (Marshall, J. concurring). It is the Board's position that the use, by a CPA, of any of the terms set forth in Rule 21A-24.001(1)(i), when those terms have not been approved by the Board is inherently misleading.
>
> In balancing the public's right to know of attainments of CPAs in addition to their license as a CPA, it is the Board's position that the use of terms set forth in Rule 21A-24.001(1)(i), in conjunction with the term "CPA" and the practice of public accounting, are so close to the terms protected by state licensure itself, that their use, when not approved by the Board, inherently mislead the public into believing that state approval and recognition exists. The terms prohibited by Rule 21A-24.001(1)(i), thus can only be used in conjunction with the "CPA" when the Board, in fact, approved a form of recognition or self designation using such terms as a Board approved specialty. It is to be noted that the Board has the authority to approve the use of such specialty designation by CPAs, however no request has ever been made for approval either by Respondent or by the parent organization which awarded her the certificate as a Certified Financial Planner, cf. *Accountant's Society of Virginia v. Bowman, supra.*

(J.A.193-194; R.1375-1376). Accordingly, the Board found Ibanez's advertisements to be in violation of Rule 21A-24.001 with respect to the use of the CFP designation in conjunction with the CPA.

Ibanez asserts that the "prohibition" against her advertisement of the CFP designation is unconstitutional because her advertisement of the designation is not potentially misleading and, in the alternative, that any misleading aspect of her advertisement could be cured through the use of a disclaimer. Neither argument has merit.

Petitioner also indicates that no valid governmental interest has been expressed to support the prohibition of her use of the term CFP in conjunction with CPA. As noted before, however, Ibanez conceded the existence of a valid governmental interest before the district court. The proper regulation of the practice of public accountancy remains a valid governmental interest.[9]

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[9] Ibanez also asserts that the Board has not banned the use of the term in a uniform manner. However, the Board opinion to which Ibanez refers involves a CPA who is not practicing public accounting and is not holding out to the public. (R.222, 372). Ibanez, by contrast, is practicing public accountancy and is holding herself out to the public as doing so.

Ibanez's claim that the use of the term CFP is not misleading when used in conjunction with CPA because the CFP certificate is "more akin to educational attainment" cannot be sustained. (Petitioner's brief at 37). Testimony below of Robert Goss, Executive Director for the International Board of Standards and Practices for Certified Financial Planners, Inc., (IBCFP) indicates otherwise. Mr. Goss testified that the IBCFP is an "international certification, standard setting, *licensing* and disciplinary body" for those who have a CFP and that the CFP mark is limited to use by those who are licensed by them to use it on an annual basis. (R.163, 175).[10] He also indicated that IBCFP has no affiliations with any governmental licensing organization within the State of Florida. (R.177). Thus, the CFP designation cannot be characterized as an educational attainment.

Moreover, unlike the situation presented to this Court in *Peel*, both the licensure at issue, Certified Public Accountant, and the private designation, Certified Financial Planner, begin with the word "certified." As noted by Justice Marshall in his concurring opinion, the term "certified" will often be understood by the general public as connoting governmental authorization. 496 U.S. at 113.

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[10] Interestingly enough, while Mr. Goss testified and the IBCFP has filed an amicus brief on Ibanez's behalf, the telephone directory advertisements at issue in this case do not comport with the IBCFP's Standard of Ethics. Those standards provide, "A CFP designee may be listed in Yellow Pages type advertising under the heading Financial Planner." (R.166, 177, 245). Ibanez's advertisement was not listed under the heading Financial Planner, but under the heading "Attorneys." (R.86, 1123).

Indeed, Justice Marshall specifically noted that many states prescribe requirements for and "certify" public accountants. That is the situation which presents itself in this case. Given that certification of a public accountant is equal to licensure in the State of Florida, it is inherently misleading to advertise another designation using the same term. Thus, the use of the CFP designation in conjunction with the CPA is not entitled to protection under the first amendment. *Peel, supra; Central Hudson.*

Even assuming Ibanez's use of the CFP designation is not inherently misleading, it is by all accounts potentially misleading. The Board can enact measures short of a total ban to prevent deception or confusion. *Peel*, 496 U.S. at 116 (Marshall, J., concurring). Contrary to Ibanez's assertions, the Board provided such an alternative which she chose not to pursue.

B. The State of Florida Requires the Disclosure of Reasonable Information in Connection With the Use of Titles by Licensed Professionals.

Ibanez asserts that banning the use of the CFP mark in conjunction with the CPA designation does not advance the State's interest and accordingly, such a ban must fail. She does not recognize, however, that Rule 21A-24.001, Florida Administrative Code provides two avenues of compliance short of prohibiting the use of the term in advertisements. The Board specifically noted that it has the authority to approve the use of a term listed in Rule 21A-24.001(1)(i); however, no request has ever been made by Ibanez or by the IBCFP. (J.A.193-194; R.1375-1376). Moreover, the Board specifically interpreted

the use of the designation as a specialty designation and, as noted by the hearing officer, the Board has so interpreted the designation since 1982. (J.A.157; R.1230).[11] As such, Rule 21A-24.001(1)(j) provides for a disclaimer that could have been utilized in Ibanez's advertising:

> (1) No licensee shall disseminate or cause the dissemination of any advertisement or advertising which is in any way fraudulent, false, deceptive, or misleading, if it, among other things:
>
> . . . .
>
> (j) States or implies that the licensee has received formal recognition as a specialist in any aspect of the practice accounting, *unless the statement contains a disclaimer with or sanctioned by the state or federal government. The advertisement must also contain the agency's requirements for recognition,* including, but not limited to, educational experience and testing. These statements must be in the immediate proximity of the statement that implies formal recognition as a specialist.

(Emphasis added). Ibanez's advertisements contain no such disclaimer.

As stated by Petitioner, this Court has consistently found in favor of more disclosure by professionals who advertise. *Bates v. State Bar of Arizona*, 433 U.S. 350, 375 (1977)("the preferred remedy is more disclosure rather

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[11] Ibanez asserts, as does the IBCFP, that financial planning is not a specialty of certified public accounting and is in fact, a separate discipline. The Florida definition of public accounting, however, includes services which use accounting skills or offer management advisory or consulting services. Financial planning fits within this definition.

than less"). *See also In re R.M.J.*, 455 U.S. 191 (1982). The opportunity to use a disclaimer as provided by the Board's advertising rule is a reasonable means to advance the interests of the Board in preventing the misimpression that CFPs are licensed by the State, while affording the licensee a method by which the designation could be advertised.

In sum, the use of the CFP mark, without more, in conjunction with the CPA designation is inherently misleading and thus not entitled to first amendment protection. Even assuming that this Court finds this argument unpersuasive, the provision for Board approval of the CFP mark or for use of a disclaimer in conjunction with the CFP mark cures any constitutional infirmity Petitioner may assert. Accordingly, the decision of the State of Florida, First District Court of Appeal, should be affirmed.

CONCLUSION

The Respondent respectfully requests that the decision of the State of Florida, First District Court of Appeal be affirmed.

Respectfully submitted,

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APPENDIX

STATUTORY PROVISIONS

473.302 Definitions. – As used in this act, the term:

(5) "Practice of," "practicing public accountancy," or "public accounting" means:

(a) Offering to perform or performing for the public one or more types of services involving the use of accounting skills, one or more types of management advisory or consulting services, by a certified public accountant, or firm of certified public accountants, of this state, including the performance of such services in the employ of another person; or

(b) Offering to perform or performing for the public one or more types of services involving the use of accounting skills, or one or more types of management advisory or consulting services, by any other person holding himself or itself out as a certified public accountant or a firm of certified public accountants, including the performance of such services by a certified public accountant in the employ of a person so holding himself or itself out.

Supreme Court, U.S.
FILED
APR 11 1994
OFFICE OF THE CLERK

No. 93-639

In The

Supreme Court of the United States

October Term, 1993

SILVIA S. IBANEZ,

Petitioner,

v.

STATE OF FLORIDA,
DEPARTMENT OF PROFESSIONAL REGULATION,
BOARD OF ACCOUNTANCY,

Respondent.

On Writ Of Certiorari To The Florida First District Court Of Appeal

REPLY BRIEF OF PETITIONER

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PETITIONER'S REPLY BRIEF

REPLY TO RESPONDENT'S STATEMENT OF ISSUE AND STATEMENT OF THE CASE

Introduction

In its Response Brief, the issue presented for review (pg. i) by the Board of Accounting, is a significant departure from the Board's statement of the issue in its Brief in Opposition to the Petition for Writ of Certiorari. The points argued by the Board, as discussed below, reflect these last minute modifications in the Board's position.

A. The Board Argues That Petitioner Is an Employee of a Firm That Is Not Licensed as a CPA Firm

In the Board's brief, the Board argues that its sole justification for restricting Petitioner's First Amendment rights, is that she is practicing public accounting in an unlicensed CPA firm. Specifically the Board argues that –

> " . . . it is only her refusal to comply with these requirements, such as licensing her firm with the Board, that compels the restriction of her use of the CPA designation." pp. 18-19

Although Petitioner was originally charged with failure to license her law firm as a CPA firm, the Board voluntarily dismissed[1] this charge, just days before the disciplinary hearing, see paragraph 22 at JA-170. The Board has acknowledged this in its decision, when it says at footnote 7 at JA-185, that Petitioner *"could have simply*

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[1] At the conclusion of the disciplinary hearing, the hearing officer found, at paragraph 23, JA-171: **"Due to DPR's withdrawal of the charges in Count I,. . . . it must be concluded that Ibanez could not be held *in this proceeding* to have violated those statutory provisions which were withdrawn."** [emphasis supplied]

been charged" for not licensing her law firm. (emphasis supplied) Instead she was charged under the Board's deceptive advertising provisions, merely due to her truthful disclosure of her earned CPA and CFP credentials after her individual name.

Petitioner's CPA certificate, copy at JA-3, does not require her to work in a licensed CPA firm, as a prerequisite to append CPA after her individual name. The language of the Board-conferred certificate is unequivocal:

> "Silvia Safille Ibanez has passed all examinations and has met all of the other requirements prescribed by law and by the rules of this Board for qualification as an expert public accountant and is therefore, *entitled to append the letters C.P.A. after this registrant's name to evidence registration by this Board as a CERTIFIED PUBLIC ACCOUNTANT."* [emphasis supplied]

Thus, the charge that the Board voluntarily dropped, has now become the driving force behind the Board's justification for violating Petitioner's First Amendment rights. The Board cannot belatedly add to the charges against Petitioner, either directly or indirectly. To do so, would violate her rights to due process.

Furthermore, the Board has failed to demonstrate how Petitioner's individual use of the CPA credential is inherently misleading, simply because her law firm is not licensed as a CPA firm.

B. The Board Has Utilized the Term "HOLDING OUT"[2] and Has Characterized Petitioner's Testimony in Order to Confuse the Issue before the Court

In its brief, the Board argues that Petitioner's testimony, particularly from the "holding out" rule challenge

[2] Indeed, in Footnote 4 of its Order, the Board acknowledged that the "holding out" rule was not operative and was not being used to discipline Ibanez. JA-182.

proceedings, in some way refutes her right to be considered a CPA in good standing.

Yet, the Board has misstated parts of Petitioner's testimony. For example, at page 17 of the Brief, the Board says that "Ibanez stated that the Board has no jurisdiction over her." [citing R-182 of the rule challenge proceeding]. However, the record is clear that, at R-182, Ibanez testified that, as a licensed CPA, she is subject to Chapter 473 Florida Statutes.

The rule challenge proceedings, reported at R-377 to R-700, focused exclusively on the validity of the "holding out" rule, and in the process many of the Board's rules were questioned, explored and analyzed. During these proceedings, not only Petitioner, but also expert witness Professor John E. Sullivan,[3] were asked numerous questions about jurisdiction of the Board, "holding out", exclusion rules, interpretations of the various Board official opinions on "holding out", etc.

Clearly, the Board's characterizations of Petitioner's opinions are no justification for her punishment. Instead, her opinions are being used by the Board as a pretext to explain the Board's suppression of Petitioner's First Amendment rights. This explains why the Board doggedly persists in using the term "holding out" [pages 7, 13, 14, 16 and others] to deny Ibanez her commercial speech rights in disclosing to the public, truthful, objectively verifiable, non-coercive biographical information.

It must be emphasized that the hearing officer issued a FINAL ORDER [reprinted at JA-116] invalidating the Board's holding out rule.[4] Although the Board initially

[3] Refer to Rule Challenge Transcript at R-510 to R-574.

[4] At JA-133, the Final Order of the hearing officer explains how the Board used the "holding out" rule: **"The rule has actually subjected CPAs, and specifically Petitioner (Ibanez'**

appealed the Final Order, the Board subsequently dismissed this appeal. Thus removing the "holding out rule" from this controversy.

The Board's self-serving interpretations of Petitioner's opinions about Florida law are not the proper focus of this disciplinary inquiry or of this appeal.

C. The Board Argues That Petitioner Refuses To Be Bound to the Board's Jurisdiction

In essence, the Board has punished Petitioner for anticipatory conduct. The Board apparently anticipates that, based on Petitioner's beliefs about the Board's jurisdiction over law firms, that she may engage in some prohibited conduct under Chapter 473 Florida Statutes, in the future. The Board's use of hypotheticals, is proof positive that the Board's decision is based on speculation. The First Amendment does not permit the suppression of free speech based on total speculation.

D. The Board Argues that Petitioner Conceded that The Board Has a Substantial Interest to Regulate the Practice of Public Accounting

The Board argues that Petitioner has concede in her Amended Initial Brief filed in the First District Court of Appeal, that there is a substantial government interest in regulating the practice of public accounting. Although the Petitioner does agree that, generally speaking, the regulation of the practice of public accounting is a substantial interest, this does not mean that the Board can

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and intervenor Brewster, to DPR disciplinary proceedings independent of any other act or wrongdoing merely for any 'publication' of the CPA credential . . . The rule may automatically subject attorney-CPA licensees to DPR disciplinary proceedings . . . merely on the basis of passive, truthful communications . . . "

use this general interest to justify the blanket suppression of Petitioner's First Amendment rights.

CONCLUSION

The pivotal question in this case is whether the Board of Accountancy has violated Ibanez' First amendment rights due to its censure of her truthful disclosure of her CPA and CFP credentials in attorney advertising. The Board is attempting to divert the Court's attention from this central issue, and to turn it into a regulatory jurisdiction issue. However, the record is clear that the Board prosecuted Ibanez, a CPA licensee in good standing, to suppress her commercial speech rights, alleging that Petitioner's use of CPA and CFP, in attorney advertising, is inherently misleading. It is not.

Accordingly, the judgment and order of the First District Court of Appeal of the State of Florida should be reversed.

Respectfully submitted,

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In The

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October Term, 1993

SILVIA S. IBANEZ,

Petitioner,

v.

STATE OF FLORIDA,
DEPARTMENT OF PROFESSIONAL REGULATION,
BOARD OF ACCOUNTANCY,

Respondent.

On Writ Of Certiorari
To The District Court Of Appeals Of Florida
For The First District

BRIEF AMICI CURIAE OF THE CERTIFIED FINANCIAL PLANNER BOARD OF STANDARDS, AND CENTRAL FLORIDA SOCIETY, JACKSONVILLE SOCIETY, SOUTH FLORIDA SOCIETY, SOUTHWEST FLORIDA SOCIETY AND TAMPA BAY SOCIETY OF THE INSTITUTE OF CERTIFIED FINANCIAL PLANNERS IN SUPPORT OF PETITIONER

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CONSENT OF THE PARTIES

Petitioner, Silvia S. Ibanez, and Respondent, State of Florida, Department of Business and Professional Regulation, Board of Accountancy, have consented to the participation of the Certified Financial Planner Board of Standards, Inc. (prior to February 1, 1994, known as the International Board of Standards and Practices for Certified Financial Planners), and the Central Florida Society, the Jacksonville Society, the South Florida Society, the Southwest Florida Society, and the Tampa Bay Society of the Institute of Certified Financial Planners, in these proceedings as amici curiae in support of the Petitioner. Their consents have been filed with this Court.

SUMMARY OF ARGUMENT

The State of Florida, Department of Business and Professional Regulation, Board of Accountancy (BOA) regulation categorically prohibiting use of truthful certification marks granted by the Certified Financial Planner Board of Standards, Inc. (CFP Board) violates the standard for commercial speech under the First Amendment.

A. The BOA regulation prohibiting use of CFP and CERTIFIED FINANCIAL PLANNER is analogous to the fact situation of *Peel v. Attorney Disciplinary Commission of Illinois,* 496 U.S. 91 (1990), and therefore, is unconstitutional. Truthful statements of certification, professional qualifications, and specialization are valuable commercial information. Certification provides valuable information to consumers concerning the nature of services available from competing professionals. Claims of certification are

true and verifiable and, absent evidence to the contrary, they are not actually or inherently misleading. Although claims of certification have the potential of misleading, this does not justify a state's regulation categorically prohibiting the use of such claims.

B. The BOA's restrictions on truthful professional and specialization claims, which are not within the practice of public accounting, are more burdensome than the regulation at issue in *Peel*. Such restrictions go well beyond the proper scope and extent of restrictions designed to achieve a legitimate governmental interest.

INTEREST OF AMICI CURIAE

The Certified Financial Planner Board of Standards, Inc. (CFP Board) is a private, not-for-profit standards-setting, credentialing, marks licensing and disciplinary body for Certified Financial Planner and CFP licensees. The mission of the CFP Board is to benefit and protect the public by setting qualifications for initial professional certification, protect its federally registered service marks CFP and CERTIFIED FINANCIAL PLANNER, to develop and administer continuing post-certification requirements and disciplinary procedures for licensees, and to encourage both certification attainment and certification retention of those persons licensed, thereby enhancing the professionalism of those engaged in the exercise and pursuit of financial planning.

The CFP and CERTIFIED FINANCIAL PLANNER marks were first placed in commerce during the early 1970's by the College for Financial Planning (College), a

Denver-based educational institution. They are distinct, federally registered service marks, which are not synonymous with one another. The College and the Institute of Certified Financial Planners (ICFP) created the International Board of Standards and Practices of Certified Financial Planners (IBCFP), recently renamed Certified Financial Planner Board of Standards (CFP Board), in 1985 and the CFP Board was given ownership of the federally registered service marks, CFP and CERTIFIED FINANCIAL PLANNER in 1986. By 1988, it could be said that "the CFP designation was the most prominent professional qualification of planners and product sales employees, held by 26% of planner employees and 25% of the product sales employees. . . . The CFP designation appears to be developing as the most recognized designation in the planning field."[1]

The CFP Board at present has approximately 27,000 persons nationwide which it has licensed to use both of its marks (CFP and CERTIFIED FINANCIAL PLANNER), all of whom have met its examination, experience, education and ethics requirements, and who continue to meet its post-certification requirements. Approximately 4,600 of these persons are dually licensed both as Certified Public Accountants (CPAs) and CFP licensees. In the State of Florida, approximately 1,400 persons are CFP licensees and over 200 are additionally licensed as CPAs.

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[1] See Financial Planners: Report of the Staff of the United States Securities and Exchange Commission to the House Committee on Energy and Commerce's Subcommittee on Telecommunications and Finance, 53 (February 1988) (Financial Planners Study).

The Central Florida Society, the Jacksonville Society, the South Florida Society, the Southwest Florida Society, and the Tampa Bay Society of the Institute of Certified Financial Planners (Florida Societies) are affiliated societies of the Institute of Certified Financial Planners (ICFP). The ICFP is a not-for-profit voluntary membership association of CFP licensees that calls on its members to aspire to the highest levels of ethical conduct, personal development, professional competence, and service to the public. The Societies are local bodies which assist the ICFP in pursuit of its goals for member education and public awareness by providing a credible source for financial planning information and for promotion of the CFP licensees to members, the general public and regulators. Membership in the Central Florida Society of the ICFP currently numbers approximately 247 CFP licensees, in the Jacksonville Society 71, in the South Florida Society 291, in the Southwest Florida Society 90, and in the Tampa Bay Society 475. Many of their members are CPAs in addition to being CFP designees.

It is the mutual concern of the CFP Board and the Florida Societies that if this order of the BOA is permitted to stand, it will establish an unfortunate precedent in each of the following respects, which this Court should not condone or affirm:

(1) If other disciplines are permitted to enforce a blanket suppression on use of the CFP and CERTIFIED FINANCIAL PLANNER credentials, by persons qualified by the CFP Board to use the marks, consumers will be denied information as to professionally qualified planners who are best able to help them with their problems. Consumers will suffer because: (a) they are unable to

ascertain professionals with the most appropriate qualifications; and (b) because this precedent will discourage additional financial planners from seeking the additional qualifications and self-regulatory constraints that the CFP designation represents.

(2) Beyond the immediate infringement of Ibanez's First Amendment rights, this order poses imminent and significant dangers to important First Amendment rights of each of the 200 CPA-CFP licensees practicing in Florida, and exposes each to a similar risk of unwarranted discipline.

(3) In addition, because of the likelihood of nationwide publicity about the BOA's order, all of the other 4,600 CPA-CFP licensees who practice outside the state of Florida stand to be placed at similar risk of losing important First Amendment rights as other states may seek to emulate the Florida BOA action.

STATEMENT

Petitioner, Silvia S. Ibanez, is a practicing attorney and a member of the Florida Bar since 1983. Petitioner (Ibanez) is also a licensed Certified Public Accountant (CPA). Ibanez was licensed to use the marks CERTIFIED FINANCIAL PLANNER and CFP in 1989. Ibanez has been actively licensed as a CFP licensee in good standing with the CFP Board, the recognized licensing authority for the CFP and CERTIFIED FINANCIAL PLANNER credential. J.A. 150. The CFP Board was created to improve the quality of financial planning by developing and

enforcing standards and providing a national credentialing process. The CFP Board certifies individuals who meet specified standards of experience, education and ability in financial planning.

Ibanez was listed in the "Attorney" yellow pages as "Ibanez, Silvia S., CPA, CFP." She was also listed in the white pages as "Ibanez, Silvia S., CPA, CFP, atty." *Id.*, at 151.

A person anonymously mailed to the BOA a copy of the yellow pages, which included Ibanez's listing, and circled her name. The BOA then instituted disciplinary action against Ibanez. On January 15, 1992, a hearing officer issued a recommended order that all charges against Ibanez be dismissed. *Id.*, at 174. The BOA subsequently disregarded the recommendation and found Ibanez in violation of Rule 21A-24.001. *Id.*, at 194. Ibanez appealed, but the decision was affirmed per curiam. *Id.*, at 196.

As to the use of CFP and CERTIFIED FINANCIAL PLANNER, the basis for the discipline is the BOA's finding that this listing constituted "false, deceptive and misleading advertising by implying a specialty of public accountancy, not recognized by the Board of Accountancy," in violation of F.A.C. 21A-24.001, and therefore, Section 473.323(1)(f), F.S. *Id.*, at 194. Insofar as the BOA offered any rationale, it cited F.A.C. 21A-24001(1)(i) which prohibits CPAs, inter alia, from advertising any "form of recognition by any entity other than the Board that uses the term 'certified' . . . . " *Id.*, at 192.

ARGUMENT

I. Certified Public Accountants have a constitutional right, under the standards for commercial speech, to advertise their truthful certification by the CFP Board as a CFP and CERTIFIED FINANCIAL PLANNER licensee.

Although the First Amendment provides less protection to commercial speech than to non-commercial speech, this Court has recognized the importance of commercial speech in a competitive market. Commercial information enables consumers to make better informed judgments in procuring services of professionals. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1976). In recognition of the importance of commercial speech, this Court's approach has been that states may only proscribe dissemination of commercial speech which is false, misleading or deceptive. *Zauderer v. Office of Disciplinary Counsel*, 105 S.Ct. 2265 (1985).

Commercial speech which is not false, misleading or deceptive and does not concern unlawful activities may be restricted (a) only to achieve a substantial government interest, and (b) only with restrictions that directly advance that interest, and (c) are no more extensive than necessary to effectuate that interest. *Central Hudson Gas and Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980).

In *Peel v. Attorney Disciplinary Commission of Illinois*, 496 U.S. 91 (1990), this Court considered the validity under the First Amendment of a disciplinary rule

adopted by the State of Illinois which prohibited attorneys from claims of certification and specialization. Petitioner's case bears a marked resemblance to the *Peel* case.

Peel, a licensed attorney, placed on his letterhead stationery, between his name and the states in which he was licensed to practice, the following statement: "Certified Civil Trial Specialist by the National Board of Trial Advocacy." *Id.*, at 96. The Attorney Registration and Disciplinary Commission of Illinois (ARD) found Peel in violation of the rule prohibiting attorneys from claiming specialization and certification and recommended censure. *Id.*, at 97.

On review, this Court's analysis began with the observation that advertising was a form of commercial speech protected by the First Amendment. *Bates v. Arizona*, 433 U.S. 350 (1977). Although the First Amendment protects truthful advertisements, misleading advertising may be entirely prohibited. Further, states may not place an absolute prohibition on advertising that is potentially misleading if the information may be conveyed in a way that would not be deceptive. However, even non-misleading advertisements may be regulated, but the state must assert a substantial interest and the interference must be in proportion to the interest served. *In re R.M.J.*, 455 U.S. 191 (1982).

This Court then held that Peel's certification was true and verifiable. *Peel*, 496 U.S., at 100. Peel's claim of certification was not actually misleading because there were not factual findings of actual deception or misunderstanding. *Id.*, at 106. Although this Court concluded that claims of certification "may not be fully understood" by

consumers and, therefore, may be potentially misleading, the state's blanket prohibition was broader than necessary to prevent the harm. *Id.*, at 107. "Even if we assume that Petitioner's letterhead may be potentially misleading to some consumers, that potential does not satisfy the state's heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public." *Id.*, at 109.

This Court then specifically stated: "A State may not . . . completely ban statements that are not actually or inherently misleading, *such as certification as a specialist by a bona fide organization* such as NBTA." *Peel*, 496 U.S., at 110 (emphasis added).

A. The BOA regulation prohibiting use of CFP and CERTIFIED FINANCIAL PLANNER is analogous to the fact situation of *Peel* and therefore is unconstitutional.

In *Peel*, this Court held unconstitutional the ARD's rule categorically prohibiting use of truthful certification by a bona fide national organization. This Court reasoned that the ARD's categorical prohibition of the term "certified specialist" did not satisfy the Central Hudson test and was, therefore, unconstitutional. Although the government interest of protecting consumers from false or misleading advertising is substantial, this Court held that an absolute prohibition was more extensive than necessary to effectuate that interest.

As in *Peel*, the BOA promulgated F.A.C. 21A-24.001 (1)(i), a blanket prohibition on the use of the term certified, on grounds of protecting the public from false and

misleading advertising. Ibanez, like Peel, holds a certification (CFP) from a bona fide national organization (CFP Board). Ibanez's actions in listing her CFP designation on her letterhead, business card and in the yellow pages, likewise, should be regarded as commercial speech, since the CFP credential is used generally in a commercial or business context. The BOA, like the ARD in *Peel*, seeks to discipline Ibanez for the use of truthful, commercial speech on grounds that it is false, deceptive and misleading advertising by implying a specialty of public accountancy, not recognized by the Board of Accountancy.

1. **Petitioner's certification to use the CFP credential is true and a verifiable fact, as are the predicate requirements for that CFP certification.**

It is undisputed that Petitioner has been licensed to use the marks CFP and CERTIFIED FINANCIAL PLANNER since 1989. There are no findings or allegations that anyone has been misled or deceived by Petitioner's use of the CFP mark.

"[I]f the certification had been issued by an organization that had made no inquiry into Petitioner's fitness, or by one that issued certificates indiscriminately for a price, the statement [(certification by the NBTA)], even if true could be misleading." *Peel* 496 U.S. at 102. As in *Peel*, the CFP Board's standards for granting the license to use its marks is objectively clear and there is no evidence that a claim of certification by the CFP Board suggests any

greater degree of professional qualification than may be reasonably inferred from its rigorous requirements.

In its initial certification and marks licensure requirements, in its post-certification requirements, and in its requirements for compliance with the CFP Board's *Code of Ethics and Professional Responsibility*, the CFP Board demands professionalism of persons it authorizes to use its marks. An applicant for the CFP or Certified Financial Planner marks must complete an educational program registered with the CFP Board in six general areas of personal financial planning, must have experience in the area of financial services, must pass a rigorous, comprehensive examination on the six subject areas of personal financial planning, and must not only sign an ethics declaration agreeing to abide by the CFP Board's *Code of Ethics and Professional Responsibility* but must also disclose any previous or then-existing ethics violations or investigations by any regulatory or self-regulatory organization. According to one government source, ". . . . The CFP designation appears to be developing as the most recognized designation in the planning field."[2]

Prior to the CFP Board of Standards' creation, the only way to obtain the CFP or CERTIFIED FINANCIAL PLANNER marks was through the College for Financial Planning (College). The CFP Board was created in part to

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[2] See Financial Planners: Report of the Staff of the United States Securities and Exchange Commission to the House Committee on Energy and Commerce's Subcommittee on Telecommunications and Finance, 53 (February 1988) (Financial Planners Study).

allow curriculum offerings at many colleges and universities to be registered by the CFP Board so that students from those educational institutions could sit for the established examinations and complete the certification process. Today over 50 programs at U.S. accredited colleges and universities have applied for and received CFP Board registration, ranging from well known schools to lesser known educational institutions of higher learning.[3]

[3] *Schools offering graduate degrees*: City University, Georgia State University, Golden Gate University, Loyola University, Northeastern University, Nova University, San Diego State University, Texas Tech University, University of Dallas, University of Miami, Walsh College, Old Dominion University. *Undergraduate degree programs are offered by* Barry University, Baylor University, California State University – Chico, California State University – Fresno, California State University – Fullerton, Campbell University, Golden Gate University, Mankato State University, Mercyhurst College, Metropolitan State College, Mississippi State University, Purdue University, San Diego State University, Southwest Texas State University, Texas Tech University, University of Alabama, University of North Texas, University of Northern Colorado, Western Kentucky University, Wright State University. *Certificate programs are offered by* Boston University, City University, College for Financial Planning, Fairleigh Dickinson University, Georgia Southern University, Lehman College, Long Island University, Manchester Community College, Merrimack College, New York University, Oakland University, Pace University, Rockland County Community College, Rollins College, Southwest Texas State University, University of California – Berkeley, University of California – Irvine, University of California – Los Angeles, University of California – Riverside, University of Central Florida, University of Houston, University of North Texas, University of Tennessee. *Associate degree programs are offered by* Waukesha County Technical College.

Registration means that the curriculum is taught at an upper division (junior, senior or graduate) level, and is comprised of no less than 180 classroom hours covering the CFP Board-defined core curriculum. This core curriculum was established on the basis of an extensive financial planner job analysis conducted for the CFP Board in 1987 and includes six major areas: Fundamentals of Financial Planning; Insurance Planning; Investment Planning; Income Tax Planning; Retirement Planning and Employee Benefits; and, Estate Planning. Within these six core areas there are 175 specific topics that constitute the model curriculum. Furthermore, the CFP Board recommends, in addition to the core curriculum, prerequisite courses in the following areas for students: Principles of Economics; Money and Banking; Principles of Financial Accounting; Financial Management; Business Law; Business Ethics; and Communication Skills or Personal Counseling.

After completion of the educational requirement at any one of the aforesaid registered programs, a CFP candidate must pass a comprehensive certification examination similar in concept to the Bar or CPA examinations. The examination has been developed by the CFP Board based upon established psychometric principles, and standards for educational testing developed by the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education.[4] The four-session exam is administered over two days with an historical pass rate

[4] See American Educational Research Association, et al., *Standards for Educational and Psychological Testing* (1985).

of about 55%. It is designed to assess the ability of candidates to apply financial planning education to financial planning situations in an integrated format, thereby protecting the public by assuring that persons are at an appropriate level of competency to practice in the field.

In addition to the education and examination requirements, the candidate must complete a financial planning-related work experience requirement. The work experience requirement is built around a "basic requirement" of a baccalaureate degree and three years of work experience. But credit is given to those with advanced financial planning-related education by decreasing the number of years of work experience required (for example, one year for those with a graduate degree in business or consumer economics, personal financial planning or financial services, or a J.D. degree from an institution accredited by one of the six regional accreditation agencies); and an alternative path for those with on-the-job learning but without a baccalaureate degree may be eligible (for example, five years of experience for those without a degree). The actual number of hours of required experience thus ranges from 2,000 hours for those who have obtained a graduate degree to 10,000 hours for those who have only completed the examination requirement. Flexibility in these requirements is designed to break down barriers to certification and practice in the field.

Once a candidate has completed the education, examination and work experience requirements, he or she must not only sign an ethics declaration agreeing to abide by the *Code of Ethics and Professional Responsibility*, but must also disclose past or pending litigation or government agency or self-regulatory disciplinary proceedings

involving the candidate. Further, after being licensed to use the marks, a licensee must continue to meet post-certification requirements which includes an annual ethics statement and registration, completion of 30 hours of continuing education every two years, and continued adherence to the *Code of Ethics and Professional Responsibility*.

Because of the rigorous standards, and the CFP Board's adherence to the certification and license processes established by the National Organization for Competency Assurance, the CFP and CERTIFIED FINANCIAL PLANNER marks are not "devoid of intrinsic meaning" and are not, therefore, actually or inherently misleading. *Peel*, 496 U.S. at 112.

2. On this record, the BOA regulation specifically prohibiting use of any designation that uses the term "certified" is in error.

Insofar as the BOA offers any rationale for prohibiting use of the CFP mark, the BOA expressly cites F.A.C. 21A-24001(1)(i), which prohibits CPAs from advertising any form of recognition by any entity other than the Board that uses the term "certified". The BOA declares that its prohibition of designations which use the term "certified" by CPAs practicing accounting, when those designations have not been approved by the BOA as specialties in the practice, inherently mislead the public into believing that state approval and recognition exist. J.A. 194.

With no finding that a misleading effect has ever occurred, it seems no more likely in the present case than

in *Peel* that Petitioner's use of her CFP designation, granted by an established and recognized national organization, would be confused with formal state recognition. To the extent the CFP Board carries out a campaign of public communication and advertising, as it does, the public in general is further informed that the CFP mark originates with an independent self-regulatory organization rather than with a governmental body.

3. The BOA's regulation is broader than reasonably necessary.

The CFP Board does not question that the regulation of public accounting is a substantial government interest. The CFP Board believes, however, that the regulation at issue is broader than necessary to reasonably effect that purpose.

Although the CFP and CERTIFIED FINANCIAL PLANNER marks are not inherently misleading, they may be considered potentially misleading under the reasoning expressed in *Peel* (certification, though truthful, may not be understood fully by some readers). *Peel*, 496 U.S. at 106. Even assuming that the marks are considered potentially misleading, "that assumption does not satisfy the State's heavy burden of justifying a categorical prohibition against dissemination of accurate, factual information to the public." *Id.*, at 109.

The BOA, as the ARD in *Peel*, is constrained by the principle that disclosure of truthful, relevant information is more likely to make a positive contribution to decision making than is concealment of such information. *Virginia*

Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

The relationship between professionals who provide services and the consumers who purchase those services is often characterized by asymmetric information. Voluntary certification is a market response to this informational asymmetry. Brief for Federal Trade Commission as Amicus Curiae at 18, *Peel*. By signifying that the professional's qualifications satisfy some objective standard, legitimate certification mechanisms facilitate consumers' differentiation of professionals "between those who possess certain desired characteristics and those who do not." W. Gellhorn, *Individual Freedom and Government Restraints* 147 (1956).

Democratic society requires regulation for the protection of its citizens. Although governmental regulation is widespread, it is more expensive, more rigid, and less effective than self-regulation, because self-regulation directly involves those who have the best knowledge about the need for action and the most incentive to take action. Self-regulatory activities include professional credentialing and academic accreditation to ensure qualifications and competence in individuals and institutions. Credentialing promotes competition by facilitating informed choice, responsible professional and institutional conduct, and excellence in professional services and education. J. Jacobs, *Certification and Accreditation Law Handbook* 6 (1992).

The importance of truthful, commercial free speech in the field of financial planning is even more important

than in other fields because of consumer needs and marketplace forces. Financial planning and other types of investment advisory services are in demand by consumers at all levels of income and sophistication.[5] Because of the exponential growth in the industry and its relative lack of regulation, the opportunity for clients of all levels of income and sophistication to be harmed is significant. (*Ibid.*) At present, the principal government regulatory mechanism for financial planners occurs under the SEC administered Investment Advisers Act of 1940, and under similar state statutes. Unqualified financial planners are a significant problem (*Ibid.* 20, 18) for consumers, and the existence of an ascertainable, independent certification in this field is valuable and rare in a competitive marketplace. So is full disclosure of material information about the financial planning practitioner to consumers. Under the CFP Board *Code of Ethics and Professional Responsibility,* disclosure required of CFP licensees exceeds requirements under federal and state regulations.

Article Third, section (a)(8) of the CFP Board's Articles of Incorporation states that one of the purposes of the CFP Board is to lessen the burdens of government by cooperating with and assisting state and federal regulatory agencies to appropriately, effectively and uniformly regulate professional financial planners. In this capacity, the CFP Board is fulfilling a valuable public purpose as a self-regulatory, voluntary certification and standards-setting body. Present governmental regulation of financial planners is not adequate because it is not sufficiently

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[5] H.R. Rep. No. 103-75, 103D Cong., 1st Sess. 18 (1993).

comprehensive, and fails to incorporate diverse disciplines such as securities, insurance and banking which are merging into one field of financial service and financial planning. As explained in the Interest section, above, the CFP designation is designed to answer the need for qualified and competent financial planners, by establishing comprehensive certification criteria which help set CFP licensees apart from other financial planners, and by positioning the CFP Board as the standard-setting organization for CFP licensees. The BOA rule will deny all 200 Florida CPA-CFP licensees the ability to identify themselves as CPA-CFP licensees to Florida consumers who are thereby denied access to this important information.

As in *Peel,* the BOA's concern about the possibility of deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment. Disclosure of information about Petitioner's certification by the CFP Board to use the marks CFP and CERTIFIED FINANCIAL PLANNER both serves the public interest and encourages the development and utilization of meritorious certification programs for financial planners. The BOA's prohibitions of Petitioner's certification claims are broader than necessary to achieve the BOA's legitimate governmental objectives and may not stand.

B. The BOA restrictions on truthful professional claims, which are not within the practice of public accounting, are more burdensome than the regulation at issue in *Peel.*

There are several important issues here. First, through the regulations at issue, the BOA presumes to

make personal financial planning a subset of the practice of public accountancy. Second, the BOA regulations unreasonably abridge the CFP Board's ownership rights in its federally registered service marks.

1. The BOA has no statutory authority to regulate other disciplines or occupations, such as financial planning, over which the BOA has no jurisdiction.

In *Peel*, the ARD sought to regulate specialties within the profession of law. Members of the *Peel* Court were concerned that it would embroil itself in the micro-management of professions that were within the State's inherent authority. *Peel*, 496 U.S. 119 (O'Connor, J. dissenting). This is not the concern in this case. This case goes beyond that case in that financial planning is not a specialty of accounting, it is a separate and distinct discipline.

Although the BOA has ruled in written opinions that CFP is an unsanctioned specialty designation of the discipline of accounting, it "has promulgated no rule concerning CFP specifically and has failed to prove up any rationale for its policy with regard to "CFP" or "CERTIFIED FINANCIAL PLANNER" contained in its letter opinions." J.A. 157.

The BOA rules prohibit the use of specialty designations in any aspect of the practice of public accountancy unless the advertisement states that the use of the term is a self-designation and/or is not sanctioned by the state or federal government. The only exception is if the terms and recognition have been approved by the BOA and, to

our knowledge, no such terms or recognition have been so approved.

Through its rules, the BOA presumes to make personal financial planning a subset of the practice of public accountancy. The CFP Board maintains this is clearly not the case. The profession of personal financial planning generally is considered to be separate and distinct from the practice of public accountancy just as is the practice of law, architecture and engineering. The CFP mark neither states nor implies that the holder has received formal recognition in any other field or specialty. Specifically, the CFP mark is not considered by the CFP Board to be a specialty of the practice of public accounting or to be a specialty of CPAs.

Although The American Institute of Certified Public Accountants (AICPA), which is a national voluntary membership organization of CPAs, has more recently developed its own specialty designation for its members who meet its requirements which is called "Personal Financial Specialist" (PFS), that designation is awarded by the Specialization Accreditation Board of the AICPA and is in no way connected with the CFP Board designations, CFP and CERTIFIED FINANCIAL PLANNER. It is instructive to note, in this regard, that a recent survey published in the Journal of Accountancy reported that the CFP designation was more popular with the survey respondents (Personal Financial Planner division members) than the PFS mark. The reason given was that the respondents were more familiar with CFP and believed it to be more prestigious and widely recognized. Donelan, *Costs and Benefits of Personal Financial Planning Accreditation*, J. Accountancy, September 1993.

To the extent that the Florida BOA considers personal financial planning to be a specialty of the practice of public accountancy, then it may have statutory authority to prohibit the use of specialties within public accounting, like the PFS specialty designation. However, the CFP Board believes the BOA's reasoning to be fallacious and a clear overreach of statutory authority when its regulatory action reaches into disciplines over which the BOA has no jurisdiction.

The CFP Board *Code of Ethics and Professional Responsibility* says that "personal financial planning" or "financial planning" denotes the process of determining whether and how an individual can meet life goals through the proper management of financial resources. The "financial planning process" denotes the process which typically includes, but is not limited to, the six elements of data gathering, goal setting, identification of financial issues, preparation of alternatives and recommendations, implementation of client decisions from among the alternatives, and periodic review and revision of the plan. "Financial planning subject areas", according to the Code, includes the basic subject fields covered in the financial planning process which typically include, but are not limited to, financial statement preparation and analysis (including cash flow analysis, planning and management), investment planning (including portfolio design, asset allocation and portfolio management), income tax planning, education planning, risk management, retirement planning and estate planning. A "financial planning professional" is one who is capable and

qualified to offer objective, integrated, and comprehensive financial advice for the benefit of individuals to help them achieve their financial objectives.

The CFP Board conducted a job analysis in 1987 which identified 175 topics which a competent financial planner would need to know. It is incontestable that a number of topics would be within the knowledge of a competent CPA.[6] However, there are a substantial number of the tasks that a CPA would not have knowledge of just by virtue of holding the CPA credential. The CFP Board has determined that, of the 175 topic areas which a CFP needs to know, a CPA may typically have covered only 30 tax-related topics in his or her educational preparation.[7] It is not the argument of the CFP Board that the two occupations do not overlap, certainly they do. However, the knowledge required of a competent CFP also overlaps with that of attorneys, insurance agents, and securities brokers. "Advisers, including financial planners, offer a variety of services to consumers, from supervising client portfolios and selling financial products to giving advice concerning not just securities, but also insurance, taxes, real estate, and savings."[8] It is this breadth of knowledge that sets the CFP apart, together with the ability to integrate all facets of a

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[6] Tax implications of securities, tax accounting, tax calculations, basis and cost recovery concepts just to name a few.

[7] Life insurance policy selection and replacement, the law of agency as applied to insurance, tort liability as applied to insurance, regulation of securities and markets, options and futures among others.

[8] See H.R. Rep. No. 103-75, 103D Cong., 1st Sess. 18 (1993).

client's personal finances into a comprehensive plan. Thus, it is this comprehensive approach to helping people manage their financial resources that distinguishes financial planners from other advisors, all of whom might focus on one area of a person's finances perhaps to the exclusion of the client's needs in other areas.

The diversity in backgrounds of CFP licensees serves as a final illustration of the difference between financial planners and public accountants. Looking at the types of businesses in which current CERTIFIED FINANCIAL PLANNER mark licensees are engaged, the largest percentage, 37.2% are engaged directly in personal financial planning; 13.9% in securities; 11.7% in accounting; 9.6% in insurance; 5.3% in banking; 1.3% in education; 13.3% miscellaneous other. The percentages holding different kinds of occupational licenses display this pattern: insurance, 62.0%; securities, 61.5%; CPA, 16.6%; real estate, 8.8%; attorney, 2.7%.

This Court wrote in *Peel*, "[w]e appreciate the difficulties that evolving standards for attorney certification present to national organizations like the ABA." *Peel*, 496 U.S. at 104. In a similar vein, one can appreciate the difficulties that the creation and appearance of new or specialized vocations present to the traditional structure of regulatory bodies. The history of the evolution of many trades, guilds, vocations and professions, from eleventh century England and Europe forward, has several longstanding themes. A first theme, is the revival of the movement toward private associations, as the practitioners of new arts and learning found common need for training centers, uniform standards, and forums for the exchange of ideas. Second, association members also

found collective interest in the adoption of ethical codes and, ultimately, in securing public licensure. Finally, entry of new vocations into the economic system often was constrained by the traditional guild or other regulatory structure. S. Rubin, *The Legal Web of Professional Regulation*, in *Regulating the Professions: A Pubic Policy Symposium* 31-35 (R. Blair & S. Rubin eds. 1980). Indeed, the rise of public accounting as a discipline in the United States can be fairly said to have followed this thematic pattern. See generally, J. Carey, *The Rise of the Accounting Profession: From Technician to Professional 1896-1936* (1969). The preceding also appears to describe the financial planning discipline as it has evolved over the past twenty years in this country. See generally, College for Financial Planning, *Twenty Years of Excellence: A Look Back* (1992).

Evolving standards and vocations may create difficulties for regulators, including the BOA. Difficulty, however, fails to rise to the level of necessity when a restriction on commercial speech which is not false, misleading or deceptive is at stake.

2. The CFP Board has not delegated or assigned control and oversight of its ownership rights in its federally registered service marks to any governmental body, specifically not to the BOA.

By virtue of its ownership of the federally registered service marks CFP and CERTIFIED FINANCIAL PLANNER, the CFP Board controls, and is obligated to control use of its marks by licensing their use only to those who meet its requirements, as previously described. The CFP

Board has not delegated or assigned control and oversight of its ownership rights in these marks to any State body, specifically not to the State of Florida Board of Accountancy (BOA).

The CFP Board has not sought approval of the CFP designation from the State of Florida Board of Accountancy as referred to in paragraph 1(g) of Rule 21A-24.001, F.A.C., nor does the CFP Board plan in the future to request such approval for Florida CFP licensees, either for those who are also CPAs or not. In addition to those reasons already argued, the reason that the CFP Board has not in the past requested such approval, nor plans to do so in the future, is because the CFP Board believes that it, and it alone, has the right to control the use of its federally registered service marks CFP and CERTIFIED FINANCIAL PLANNER. The CFP Board believes that the Florida BOA (or any other private or government entity) does not have the right to control the use of its marks.

Any interference by any other organization or regulatory authority in the free use of these marks in interstate commerce constitutes an abridgement of our licensees' commercial free speech rights to provide truthful information to the public about designations or licenses that they have in fact earned. And, any attempt to control the free use of a professional designation actually earned and currently owned is, per se, anticompetitive in nature.

CONCLUSION

The BOA claims that its rules are a "reasonable fit" (J.A. 187, 190) between the public good and the limitations it has imposed on commercial speech. To the contrary, the CFP Board believes that the restraining effect of BOA's orders and rules on the use of the CFP designation, a legitimate and recognized certification and designation, utilized in a field which is distinct from the practice of public accountancy, indefensibly exceeds the *Central Hudson* standards that determine proper scope of restrictions designed to achieve a legitimate governmental interest. The BOA's order and regulations prohibiting CPA-CFP licensees from advertising their claims of certification is in violation of important first Amendment protections for commercial speech. Clarity and consistency of rulings in this area are necessary, and hence this court should overturn BOA's disciplinary order against Ibanez.

Respectfully submitted,

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February 28, 1994

Supreme Court, U.S.
FILED
FEB 28 1994
OFFICE OF THE CLERK

No. 93-639

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

SILVIA S. IBANEZ,
Petitioner,
v.
STATE OF FLORIDA,
DEPARTMENT OF PROFESSIONAL REGULATION,
BOARD OF ACCOUNTANCY,
Respondent.

On Writ of Certiorari to the District Court of Appeal of Florida for the First District

BRIEF AMICUS CURIAE OF THE ALLIANCE OF PRACTICING CERTIFIED PUBLIC ACCOUNTANTS, THE INTERNATIONAL ASSOCIATION FOR FINANCIAL PLANNING, IDS FINANCIAL SERVICES INC., AND H.D. VEST FINANCIAL SERVICES IN SUPPORT OF PETITIONER

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INTEREST OF AMICI

The Alliance of Practicing Certified Public Accountants (APCPA) is an organization with more than 2,000 members, and represents the interests of local CPA practitioners who are not affiliated with large national accounting firms. APCPA seeks to change rules and regulations that control the ways practicing CPAs market and charge for their services. Such regulation, in APCPA's view, tends to advantage large national accounting firms at the

expense of the local practitioner, and needlessly deprives consumers of valuable information about the services available to them, as well as flexible options for obtaining those services.

The International Association for Financial Planning (IAFP) was founded in 1969 and has 11,500 members. It is the oldest and largest membership association of its kind for those who provide financial planning services. IAFP provides members with educational and training opportunities. IAFP also develops and enforces ethical standards for financial planners, which are embodied in the IAFP Code of Professional Ethics.

IDS Financial Services Inc. (IDS) is a subsidiary of American Express company and has its principal place of business in Minneapolis, Minnesota. Through its Tax and Business Services division, IDS offers tax planning and bookkeeping services to small and medium size businesses throughout the country. Although IDS is not itself a "CPA firm" in that it is not owned entirely by CPAs, IDS does employ CPAs in its local offices throughout the country to provide these services to its business clients.

H.D. Vest Financial Services is a financial services corporation for tax professionals, and has its principal place of business in Irving, Texas. H.D. Vest does not itself provide accounting or financial planning services to the public. H.D. Vest offers financial products to the public through its local representatives, many of whom are CPAs and CFPs.

These *amici* are vitally interested in the removal of unconstitutional restraints on the ability of certified public accountants and certified financial planners to inform the public of their credentials. The restrictions at issue in this case are typical of those that a number of States impose on CPAs who seek to offer tax or financial planning services in settings other than the traditional CPA firm, such as law firms, business services firms, or financial planning firms. In the view of these *amici,* such restrictions, though purportedly consumer protection measures, are in fact profoundly anti-consumer because they deprive the public of truthful, readily verifiable information about the experience, training and qualifications of thousands of CPAs and CFPs who are offering tax or financial planning services but are not part of traditional CPA firms.[1]

STATEMENT

By its own admission, the Florida Board of Accountancy disciplined Petitioner Silvia S. Ibanez for truthfully identifying herself as a certified public accountant (CPA) and certified financial planner (CFP) on her business card and in the yellow pages. The parties apparently disagreed as to whether state law authorized the Board to do so, but that dispute is over. The Florida Board of Accountancy has *in fact* disciplined Mrs. Ibanez because she advertised her CPA and CFP designations while practicing law, and the Florida courts have affirmed the Board. As it comes to this Court, therefore, the case poses a straightforward question: did the Board's action violate the First Amendment?

To answer that question, this Court must determine whether the Board has proven that Mrs. Ibanez's use of the CPA and CFP designations "was misleading and, even if it was not, whether the potentially misleading character of such statements creates a state interest sufficiently substantial to justify a categorical ban on their use." *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois,* 496 U.S. 91, 100 (1990) (plurality opinion); *id.* at 112 (concurring opinion). As will be demonstrated, the Board cannot possibly meet this standard.

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[1] The parties have consented to the filing of this brief. Letters of consent are on file with the Clerk of this Court.

A. The Facts

Silvia S. Ibanez is a practicing attorney and member in good standing of the Florida bar. She holds an active CPA license in good standing, and complies with Florida's technical, ethical and continuing education requirements for CPAs. She is a registered investment advisor with the Securities and Exchange Commission and with the Florida Division of Securities, and meets all requirements imposed by those regulatory authorities. She is certified as a specialist in financial planning by the International Board of Standards and Practices for Certified Financial Planners, Inc. (IBCFP), and thus has the right to use the CFP registered trademark. *See* Recommended Order of Hearing Officer, Findings of Fact ¶¶ 1, 2.[2]

Mrs. Ibanez offers professional services to the public through her law firm. She has adopted the "professional association" mode of corporate organization, but is a sole practitioner. Her legal practice focuses on tax and estate planning services. She provides tax opinions, represents clients before the Internal Revenue Service, and evaluates the tax consequences of proposed transactions. Mrs. Ibanez also provides financial planning and advice to her clients. Findings ¶ 11; Pet. App. 27a. Her practice does not involve services reserved exclusively to accountants under Florida law—the so-called audit and attest functions. *See generally Edenfield v. Fane*, 113 S. Ct. 1792, 1799 (1993) (in audit and attest function, CPA "reviews financial statements and attests that they have been prepared in accordance with generally accepted accounting principles and present a fair and accurate picture of the firm's financial condition)."[3] Nor does she

[2] All citations in this section of the Statement are to factual findings in the Hearing Officer's order that were affirmed by the Florida Board of Accountancy, and thus must be taken as established for purposes of this case.

[3] Section 473.322(c) of the Florida Accountancy Act prohibits any person not holding an active CPA license from performing the audit or attest function. But this provision does "not prevent the performance by persons other than certified public accountants of other services involving the use of accounting skills, including the preparation of tax returns and the preparation of financial statements without expression of opinion thereon." Fla. Stat. Ann. § 473.322(c). Thus, the only function reserved exclusively to CPAs in Florida is the audit and attest function.

provide bookkeeping or payroll services to clients. She does use her knowledge of accounting and financial planning in performing tax and estate planning services for clients in her law practice. Findings ¶ 11; Pet. App. 27a. There is no disagreement in this case that a licensed attorney may also hold a CPA license, and that CPAs may legally provide all the services Mrs. Ibanez provides in the context of a law practice. Findings ¶ 12; Pet. App. 28a.

Mrs. Ibanez is listed in the yellow pages under the "Attorney" heading, but no other. Findings ¶¶ 7-8; Pet. App. 26a-27a. Her listing discloses the truthful fact that she is a CPA and a CFP. Mrs. Ibanez also uses the CPA and CFP designations on her business cards and letterhead. This information is valuable to prospective clients because it permits them to make informed decisions respecting whom they wish to engage to perform tax and estate planning services. Indeed, her CPA certificate expressly authorizes her to "append the letters CPA after [her] name to evidence registration . . . . as a Certified Public Accountant." Findings ¶ 4; Pet. App. 26a.

Mrs. Ibanez is, in many respects, representative of an accelerating trend in the provision of professional services. Although traditionally most CPA services involved the audit and attest function, non-attest work as a percentage of total CPA services has grown dramatically in recent decades. The majority of CPAs today do not perform the traditional audit and attest function reserved by law to those holding a CPA license. Most CPAs use their skills in the provision of tax services, business services or financial planning—services not reserved exclu-

sively to CPAs by law. Indeed, fewer than half of those who hold CPA licenses in Florida are engaged in the traditional practice of accounting.[4] Tens of thousands of individuals now hold multiple credentials, and make use of their accounting skills in offering legal advice, financial planning or business services.

B. The Proceedings Against Mrs. Ibanez

1. *The Charges Against Mrs. Ibanez*

The Florida Department of Professional Regulation (DPR), which encompasses the Board of Accountancy, filed an administrative complaint against Mrs. Ibanez in 1991. The complaint was initiated by the Board itself, and not as the result of any allegations by a consumer. The complaint alleged violations of Fla. Stat. Ann. §§ 473.323(1)(a), (f), (g) and (h), and Fla. Admin. Code Rules 21A-20.012 and 21A-24.001(1).[5] Section 473.323(1)(a) authorizes disciplinary action for violations of any provision of the Accountancy Act regulating CPAs. Section 473.323(1)(f) prohibits "fraudulent, false, deceptive or misleading" advertising. Sections 473.323(1)(g) prohibits "fraud, deceit . . . negligence, incompetency or misconduct, in the practice of public accounting." Section 473.323(1)(h) authorizes disciplinary action for violation of any rule established under authority of the Accountancy Act. Rule 21A-20.012 defines "holding out" for purposes of the Accountancy Act, but does not itself impose any substantive restrictions. Rule 21A-24.001(1) defines and restricts certain forms of advertising, including specialty designations and claims of certification.

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[4] *See* Memorandum of Florida Institute of Certified Public Accountants (April 16, 1991). This memorandum is a matter of record in *Ibanez v. Board of Accountancy*, DOAH Case No. 91-3336R, a companion to the instant proceeding. *See* Pet. App. 24a. The record in the companion proceeding was incorporated into the record of this proceeding. Pet. App. 24a-25a.

[5] The Rules are now codified at Fla. Admin. Code § 61H1-20.012 and § 61H1-24.001(1).

DPR's original complaint contained three counts. The first alleged that Mrs. Ibanez was subject to discipline under 473.323(1)(a) because, by using the CPA designation, she was "practicing public accounting", and was not practicing within a licensed CPA firm. Pet. App. 46a. In particular, the Board alleged that Mrs. Ibanez's "affiliation" with her solo law practice triggered this prohibition. The second count alleged that Mrs. Ibanez violated Sections 473.323(1)(g) and (h), as well as Rule 21A-24.001(1)(g), by using the CFP designation. Pet. App. 46a-47a. The third count alleged that Mrs. Ibanez violated 473.323(1)(f) and (h), as well as Rule 21A-24.001, because her use of the CPA designation was inherently misleading. *See* Pet. App. 45a-47a.

Prior to the evidentiary hearing before a hearing officer, DPR withdrew all allegations that Mrs. Ibanez violated Sections 473.309 and 473.3101 by practicing public accounting while affiliated with an unlicensed firm. Pet. App. 46a. According to the Hearing Officer, "[d]ue to DPR's withdrawal of the charges . . . specifically citing Sections 473.309 and 473.3101 . . . it must be concluded that Ibanez could not be held in this proceeding to have violated those statutory provisions." Pet. App. 46a.

Thus, as framed for the proceedings before the Hearing Officer, the case against Mrs. Ibanez consisted entirely of allegations that her use of the CPA and CFP designations was misleading.

2. *Proceedings Before the Hearing Officer*

At the evidentiary hearing, DPR introduced three exexhibits and the brief testimony of three witnesses. The first exhibit was Mrs. Ibanez's business card, the second was a composite of several Board of Accountancy opinion

letters relating to the CFP designation, and the third was a copy of Mrs. Ibanez's CPA certificate.[6]

The first witness, Mr. Robert Dooner, was asked to examine Mrs. Ibanez's business card. Based solely on that examination, Dooner testified that Mrs. Ibanez "is telling the public that she is available and offering to perform services that CPAs normally perform." Disciplinary Hearing Transcript (H. Tr.) at 17.[7] On cross-examination, Mr. Dooner admitted that he was unaware of any empirical data about what views consumers form when they see CPA on a business card, or whether they are misled in any way when attorneys include the CPA designation in listings of professional credentials. (H. Tr. at 20-21).

The second witness, Ms. Elise Rice, purported to testify as a representative of the "uninformed public," and stated that Mrs. Ibanez's business card confused her as to whether Mrs. Ibanez's law firm provided legal services or accounting services. Ms. Rice was a DPR employee. The Hearing Officer found her testimony unworthy of belief. Pet. App. 30a.

The third witness was the executive director of the Board of Accountancy, Mrs. Martha Willis. She testified that Mrs. Ibanez's use of the CFP designation constituted advertising of a particular "specialty" in accounting. According to Mrs. Willis, this "specialty" designation violated Rule 21A-24.001(1)(g) because the Board had not expressly approved CFP as a specialty designation.

[6] The Board found that Mrs. Ibanez's yellow pages listing was one instance of misleading speech. The yellow pages listing was not, however, introduced by the Board at the evidentiary hearing.

[7] Mr. Dooner was also the expert for the Board in *Edenfield v. Fane*. This Court concluded that his testimony in *Fane* contained "nothing more than a series of conclusory statements that add little if anything to the Board's original statement of its justifications." 113 S. Ct. 1792, 1801 (1993).

On cross-examination, she admitted that she did not know whether Mrs. Ibanez "misleads anybody" by holding out as a CFP. (H. Tr. at 43). She also admitted that she was unaware of any empirical evidence that use of the CFP designation misleads consumers in any way. (H. Tr. at 42-43).

The Board produced no evidence that Mrs. Ibanez's claims of CPA and CFP certification were anything other than an accurate reflection of her education, training and qualifications in accounting and financial planning. The Board produced no evidence indicating that anyone had actually been misled or confused by Mrs. Ibanez's use of the CPA or CFP credential. The Board produced no empirical studies or other evidence indicating that the public is confused or misled in any way when attorneys use the CPA designation. The Board produced no studies or empirical evidence that the public is misled or confused in any way by the CFP designation, even when it is used in conjunction with the CPA designation. As counsel for the Board argued, "the whole case boils down to the use of the CPA, CFP designations. . . . The advertising rule, specifically, says that if you use it that is *in and of itself* misleading and deceptive." (H. Tr. at 49) (emphasis added).

Mr. Robert Goss testified for Mrs. Ibanez. Mr. Goss is President of the International Board of Standards and Practices for Certified Financial Planners, Inc. (IBCFP). Goss testified that the CFP designation was owned by IBCFP and had protected status under federal trademark law, and that IBCFP vigorously policed use of the CFP designation. His testimony set forth in detail the rigorous requirements for attaining the CFP designation.[8]

Mrs. Ibanez testified in her own defense. She testified that she was a licensed CPA and CFP in good standing,

[8] Those requirements are set forth in the Brief Amicus Curiae of the International Board of Standards and Practices for Certified Financial Planners, filed in support of the petition for certiorari.

and that she performed no audit or attest work. Mrs. Ibanez also testified that she did not believe she was "holding out" as a CPA because she was not providing a full-service accounting practice, but merely sought to inform potential legal clients that she had additional knowledge and training in accounting and financial matters that might be relevant to their decision whether to employ her for tax or estate planning services. Because she was not "holding out" as a CPA, she argued that she was not "practicing public accounting" within the meaning of Section 473.323 (H. Tr. 67-99), and therefore not subject to sanction by the Board for her use of the CPA credential.

3. *The Hearing Officer's Decision*

The Hearing Officer reached two legal conclusions. First, the Hearing Officer concluded that Mrs. Ibanez had not violated the prohibition against engaging in misleading conduct while "practicing public accounting." According to the Hearing Officer, Mrs. Ibanez was not "holding out" to the public as a person practicing public accounting, but was merely informing potential legal clients of additional qualifications to perform certain legal services, such as tax preparation or estate planning. *See* Findings ¶ 21; App. 31a. Because the prohibition of misleading advertising applied only to those "practicing public accounting," the Hearing Officer concluded that DPR was without authority to proceed against Mrs. Ibanez on this ground.

Second, the Hearing Officer concluded that the Board could not constitutionally punish Mrs. Ibanez for using her CPA and CFP credentials—even if she were "practicing public accounting." The Hearing Officer found nothing misleading about Mrs. Ibanez's use of either credential. In particular, the Hearing Officer found that DPR "presented no evidence by way of anecdotal experience, professional studies, or accumulated data to show

that licensed CPAs or certified CFPs have ever mislead [sic] anyone by displaying their credentials in the manner Ibanez has done here." Findings ¶ 25; Pet. App. 32a. The Hearing Officer also found that there was no "evidence that any member of public has ever been confused about whether or not Ibanez was practicing accounting or law or financial planning or that any member of the public was mislead [sic] into hiring Ibanez under the impression that she would be acting as a CPA solely, and not as an attorney, or that she would be performing audits or performing the attesting function of a CPA." Findings ¶ 26; Pet. App. 32a.

4. *The Board of Accountancy's Decision*

The Board of Accountancy accepted almost all the Hearing Officer's factual findings (including ¶¶ 25 and 26), but reversed the Hearing Officer's legal conclusions. The Board specifically rejected the Hearing Officer's interpretation of "practicing public accounting." In the Board's view, any licensed CPA who uses the CPA designation is "practicing public accounting" and thus subject to all laws regulating public practice, even if the CPA is principally engaged in the practice of law.

The Board acknowledged that the "sole purpose" of the restrictions being enforced against Mrs. Ibanez "is to provide consumers with the knowledge that if they use a CPA's services, and those services are within the practice of public accounting, as defined in Section 473.302 (4), F.S., that a CPA will be subject to the technical, educational and other standards promulgated by the Florida legislature and the Board of Accountancy." Pet. App. 6a (emphasis added). As the Board further explained, "the function" of these provisions "is to *let the public know* that those individuals who are licensed have met, and continue to meet, the standards set out by the legislature and the appropriate regulatory boards through statutes and rules." Pet. App. 7a (emphasis added).

The Board held that Mrs. Ibanez's use of the CPA credential was inherently misleading. That holding did not rest on the claims made at the evidentiary hearing that the public would be confused over the services Mrs. Ibanez would provide. Instead, the Board concluded that Mrs. Ibanez "has, in effect, told the public that she is subject to the provisions of Chapter 473, and the jurisdiction of the Board of Accountancy when she believes and acts as though she is not." Pet. App. 11a. Apparrently, the Board based this conclusion on the fact that Mrs. Ibanez had advanced a legal argument that she was not "practicing public accounting" within the meaning of Section 473.323, and thus not in violation of its prohibition on misleading advertising by those practicing public accounting.

The Board's opinion acknowledged that Mrs. Ibanez was in fact subject to the full panoply of statutory and regulatory requirements Florida imposes on CPAs, Pet. App. at 11a n.7, and did not explain how Mrs. Ibanez's subjective belief as to whether she was subject to laws governing the "practice of public accounting" was relevant. Nor did the Board identify any evidence to support the assertion that Mrs. Ibanez "acts as though" she is not subject to those rules. Nonetheless, the Board held that when Mrs. Ibanez holds out as a CPA she is equivalent to an unlicensed person claiming to be a CPA. Pet. App. 10a, 11a.

With respect to the CFP credential, the Board concluded that Mrs. Ibanez's commercial speech was misleading because designations implying "certification" in conjunction with the CPA designation "inherently mislead the public into believing that state approval and recognition exists." Pet. App. 20a. According to the Board, such terms are inherently misleading unless "the Board has approved . . . a form of recognition or self-designation using such terms as a Board approved specialty." Pet. App. 20a.

Based on these findings, the Board reprimanded Mrs. Ibanez. Pet. App. 20a.

C. Judicial Review

Mrs. Ibanez sought judicial review in the Florida district court of appeal. That court affirmed the Board per curiam without opinion. Pet. App. 2a. As a result, Mrs. Ibanez had no right of review in the Florida Supreme Court. She thus petitioned for certiorari. This Court granted the petition on January 14, 1994.

SUMMARY OF ARGUMENT

The central question presented is whether the Florida Board of Accountancy has advanced a constitutionally adequate defense of its decision to censure Mrs. Ibanez for making truthful and verifiable public statements that she is a CPA and CFP. The answer to that question is no.

1. "Holding out"—which includes using the CPA and CFP designations on signs, letterheads, business cards, and publications sent to clients and potential clients—is commercial speech protected by the First Amendment. *See Peel*, 496 U.S. at 101. A statement that a person holds a CPA license or CFP certificate is "a statement of objective [and] . . . verifiable fact, as are the predicate requirements for that certification." *Id.* Such information helps consumers evaluate "the way in which a particular product or service compares to its alternatives in the market." *Fane*, 113 S. Ct. at 1798. That is equally true when consumers seek legal advice that implicates tax, estate planning or other issues on which accounting and financial planning skills may be of use.

Florida's ban on holding out by CPAs such as Mrs. Ibanez thus "threatens societal interests in broad access

to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard." *Fane*, 113 S. Ct. at 1798. *See also Bates v. State Bar of Arizona*, 433 U.S. 350, 377-78 (1977). The ban can be sustained only if the state demonstrates that it materially advances a substantial state interest and is narrowly tailored to avoid undue suppression of valuable expression. *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980).

2. These established principles require reversal. With respect to Mrs. Ibanez's use of the CPA designation, the Board has made no showing that it was misleading in any respect. The CPA designation is a state-conferred assurance that the certified individual is of good character, has the requisite education and training in accounting, and has passed a state-administered examination designed to ensure competence. So long as a person holds a valid CPA license, "holding out" as a CPA cannot, by definition, be even potentially misleading in the way feared by the dissenting Justices in *Peel*; there is no risk that the public will *wrongly* assume state certification because the State is in fact certifying.

Lacking any substantial argument that Mrs. Ibanez's use of the CPA designation was misleading, the Board has had to resort to a transparently implausible one. The Board asserts that Mrs. Ibanez's use of the CPA designation was misleading because she has "in effect, told the public that she is subject to the provisions of Chapter 473 . . . when she believes and acts as though she is not." Pet. App. 11a. That rationale fails for several reasons.

First, like every licensed CPA in Florida, Mrs. Ibanez is regulated by the Board. Section 473 of the Accountancy Act expressly provides that "[e]very licensee shall be governed and controlled by this act and the rules

adopted by the Board." Fla. Stat. Ann. § 473.304. Indeed, this very case arises out of a Board proceeding against Mrs. Ibanez, and the Board's opinion acknowledges that she could have been charged with violating the substantive provisions of Section 473. Pet. App. at 11a n.7. Thus, irrespective of what Mrs. Ibanez "believes," there is *no* risk—actual or potential—that members of the public will *falsely* conclude she is subject to the Board's regulatory authority. Even if members of the public make such assumptions, the assumptions will be accurate. In any event, it is not credible to argue that Mrs. Ibanez believed she was not subject to the Board's jurisdiction. She participated fully in the DPR disciplinary proceedings, and sought to defend her conduct on the merits. She simply offered an interpretation of the substantive scope of Section 473.323 different than that held by the Board.

Second, the Board made no effort to prove any material risk that the public would be confused in this way—or any other—by attorneys using their CPA designation on business cards and letterhead, and in attorney listings in the yellow pages. The Board thus has not shown that "the harms it recites are real." *Fane*, 113 S. Ct. at 1800.

Third, there is not a shred of evidence that Mrs. Ibanez "acts as though" she is not subject to the statutes and rules governing Florida CPAs. As the Hearing Officer specifically found, Mrs. Ibanez "could not be held in this proceeding to have violated" statutory provisions against CPAs affiliating with unlicensed firms. Pet. App. 46a. The Board withdrew those allegations, and introduced no evidence to support them. Nor did the Board introduce any evidence to support its present suggestion that Mrs. Ibanez accepts remuneration in forms prohibited to CPAs (such as contingent fees). *See* Pet. App. 11a.

3. These First Amendment principles also foreclose punishment of Mrs. Ibanez for using the CFP designation.

The CFP designation is not a misleading claim of specialty. CFP is widely recognized national private credential, protected by federal trademark law. Only those who meet the rigorous, comprehensive requirements of the IBCFP may call themselves CFPs. Thus, there is no substantial risk that the public will be misled into falsely assuming that those who hold out as CFP's are especially qualified to provide financial planning services. Furthermore, nothing in Florida law prohibits any person from using the designation.

Nor is there any substantial risk that the public will be confused when the CFP designation is used in conjunction with the CPA designation. This Court's decision in *Peel* establishes that claims of certification are not inherently misleading; there is simply no reason to assume that the public will invariably assume that the CFP certification is state-sponsored. Even if the CPA and CFP designations are potentially misleading when used together, that would not justify the outright ban the Board has imposed. "[T]he States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive." *In re R.M.J.*, 455 U.S. 191, 203 (1982). *Accord Fane*, 113 S. Ct. at 1801-02; *Peel*, 496 U.S. at 111; *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 473-78 (1988); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 644-49 (1985); *Bates v. State Bar of Arizona*, 433 U.S. at 372-74. The risk of confusion could be completely dispelled by a disclaimer making clear that the CFP designation is not state-sponsored, or by other regulatory alternatives far less draconian than the absolute ban Florida has imposed. *See Peel*, 496 U.S. at 117; *Bates*, 433 U.S. at 375 ("the preferred remedy is more disclosure rather than less"). Indeed, the Board has such an alternative at hand. The Board generally permits claims of specialization, so long as they are accompanied by an appropriate disclaimer. *See* Rule 21A-24.001(1)(g); Fla. Admin.

Code § 61H1-24.001(1)(g). The Board made no effort to show why that general approach cannot achieve the objectives the Board seeks to achieve by an outright ban on the CFP designation.

ARGUMENT

I. COMMERCIAL SPEECH BY PROFESSIONALS ABOUT THEIR QUALIFICATIONS AND EXPERIENCE DESERVES SUBSTANTIAL FIRST AMENDMENT PROTECTION, AND CANNOT BE PROHIBITED UNLESS THE STATE PROVES THAT THE PROHIBITION MATERIALLY ADVANCES A SUBSTANTIAL STATE INTEREST AND IS NARROWLY TAILORED.

A. Advertising of Professional Certification Receives Substantial First Amendment Protection.

This Court's recent decisions in *Edenfield v. Fane*, 113 S. Ct. 1792 (1993), and *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993), strongly reaffirmed the "value of commercial speech." *Discovery Network*, 113 S. Ct. at 1511. As *Fane* makes clear, commercial speech by professionals makes an important contribution to the public welfare by increasing the ability of consumers to make informed choices about matters of importance to them. Speech about professional certification makes an especially important contribution. A claim of certification provides "reliable, verifiable evidence of petitioner's experience." *Peel*, 496 U.S. at 99. A statement that an attorney holds a CPA license is "a statement of objective [and] . . . verifiable fact, as are the predicate requirements for that certification." *Id.* at 101. Thus, "[i]nformation about certification and specialties facilitates the consumer's access to legal services" and other professional services. *Id.* at 110.

B. Because Commercial Speech Makes An Important Contribution To Public Welfare, Government Must Make A Substantial Showing To Justify Regulation.

Because Florida's ban on "holding out" restricts constitutionally protected commercial speech, it must be judged under the appropriate First Amendment standard of review. To minimize the suppression of valuable commercial information, the First Amendment requires the "government['s] goal to be substantial, and the cost to be carefully calculated" when regulating such speech. *Board of Trustees of S.U.N.Y. v. Fox*, 492 U.S. 469, 480 (1989). A State may not ban commercial speech unless it is inherently misleading, and may regulate commercial speech only if the regulation directly advances a substantial interest and is narrowly tailored to avoid infringing unreasonably on protected expression. *Fane*, 113 S. Ct. at 1801-02; *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. at 566.

Blanket bans on commercial speech are extremely disfavored. The mere opportunity for "isolated abuses or mistakes does not justify a total ban on . . . protected expression." *Shapero*, 486 U.S. at 476. Government may not suppress truthful and nondeceptive commercial speech "merely to spare itself the trouble of distinguishing such advertising from false or deceptive advertising." *Zauderer*, 471 U.S. at 646. As this Court has made clear,

> the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.

Id.

Furthermore, "[i]t is well established that the party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Fane*, 113 S. Ct. at 1800; *Discovery Network*, 113 S. Ct. at 1510. As *Fane* holds:

> This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.

Fane, 113 S. Ct. at 1800.

II. THE FIRST AMENDMENT PROHIBITS THE STATE OF FLORIDA FROM PUNISHING MRS. IBANEZ FOR USING THE CPA DESIGNATION.

A. Mrs. Ibanez's Use of the CPA Designation Was Not Misleading.

Commercial speech may be banned only if it is "inherently misleading." Inherently misleading speech necessarily and irremediably deceives its audience in a material way. States must distinguish between this limited category of unprotected expression and expression that merely holds the *potential* to mislead. "[T]he States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive." *In re R.M.J.*, 455 U.S. at 203; *Fane*, 113 S. Ct. at 1800-02; *Peel*, 496 U.S. at 111; *Zauderer*, 471 U.S. at 644-49; *Bates*, 433 U.S. at 372-74.

In this case, the Florida Board of Accountancy claims that Mrs. Ibanez's use of the CPA designation is inherently misleading. But Mrs. Ibanez is in fact a licensed CPA in good standing, and the Board introduced no evidence indicating that Mrs. Ibanez's use of the CPA designation was "actually misleading." Neither the Board nor the Florida courts made "any factual finding of actual deception or misunderstanding." *See Peel*, 496 U.S. at 101. Thus, as in *Peel*, "given the complete absence of deception in the present case," this Court should "reject

the contention that petitioner's [speech] is actually misleading." *Id.* at 106.

The Board also failed to introduce any evidence—empirical, anecdotal or otherwise—showing that consumers are inherently misled *in any way* when attorneys use a CPA designation in conjunction with their legal practice. Thus, as in *Peel*, the Board's position rests entirely on the claim that Mrs. Ibanez's use of the CPA designation is inherently misleading as a matter of law. "Whether the inherent character of a statement places it beyond the protection of the First Amendment is a question over which Members of this Court should exercise *de novo* review." *Peel*, 496 U.S. at 108.

"Holding out" as a CPA presents none of the dangers typically thought to justify state regulation of professional certification claims. When displayed by licenseholders such as Mrs. Ibanez, the CPA designation conveys accurate, objectively verifiable information about the designee's moral character, education, and accounting skill. The requirements for certification are plainly set forth in the Florida Statutes. There is thus no significant risk of consumer confusion as to what the CPA designation connotes. That is why CPAs are authorized, on the face of the CPA certificate itself, to use the CPA designation on cards, letterheads and other documents intended for prospective clients. And, in contrast to *Peel*, there is no potential risk here that the public will falsely assume the State has conferred the certification—CPA status *is* state-conferred.

B. The State's Decision to Prohibit Mrs. Ibanez From Using the CPA Designation Does Not Materially Advance Any Substantial State Interest.

Lacking any argument that Mrs. Ibanez's use of the CPA designation is actually or inherently misleading, the Board has advanced a contrived rationale. According to the Board, Mrs. Ibanez may have falsely induced consumers to believe that she is subject to Board regulation, and thus to overestimate the extent of Board supervision. Pet. App. 11a ("Respondent has, in effect, told the public that she is subject to the provisions of Chapter 473, and the jurisdiction of the Board of Accountancy when she believes and acts as though she is not."). In the Board's view, therefore, Mrs. Ibanez's speech creates a risk that its audience will mistakenly assume the Board is regulating Mrs. Ibanez's activities. To make this point, the Board analogized Mrs. Ibanez's use of the CPA credential to use of that credential by an unlicensed person. Pet. App. 15a.

Although protecting the public from potentially misleading speech is a substantial interest "in the abstract," the Board has failed to show how the interest is implicated in any way here. *See Fane*, 113 S. Ct. at 1800. The Board produced *no* evidence showing that the CPA designation causes consumers to form any opinions as to the degree to which the CPA is subject to state regulation, much less that they will erroneously overestimate the degree of official supervision. To the contrary, all the evidence in this case indicates that the public simply understands the CPA designation as an objective indicium of education, training and experience in accounting.[9] Furthermore, Mrs. Ibanez is fully subject to the regulatory power of the Florida Bar, and to all generally

[9] Indeed, the Board's present theory departs substantially from the case the Board sought to make before the Hearing Officer. The two witnesses testifying about Mrs. Ibanez's use of the CPA designation—Robert Dooner and Elise Rice—both opined that when an attorney or law firm advertisement contains a CPA designation, the public will be confused as to whether the law firm provides accounting services, and, if, so, what types of accounting services. The Hearing Officer found this claim insupportable, and the Board did not pursue it in the decision reversing the Hearing Officer. Instead, the Board shifted to the theory that consumers would be misled about the extent to which Mrs. Ibanez is subject to the Board's regulatory jurisdiction.

applicable state laws and regulations forbidding consumer fraud and deception.[10]

The lack of evidence to support the Board's justification is hardly surprising given its inherent implausibility. If consumers assume Mrs. Ibanez is subject to the Board's regulatory oversight, they will be correct. Section 473 of the Act expressly provides that "[e]very licensee shall be governed and controlled by this act and the rules adopted by the Board." Fla. Stat. Ann. § 473.304. The Board specifically found that Mrs. Ibanez was holding out as a CPA and expressly held that the Board had regulatory authority over any CPA who holds out. In any event, Section 473.323(f) prohibits misleading advertising by any licensee, not merely those "practicing public accounting," and thus plainly applied to Mrs. Ibanez even if she were correct in her interpretation of the Accountancy Act. The Board also made clear that it could have prosecuted Mrs. Ibanez for alleged violations of substantive provisions of the Act rather than for misleading advertising. See Pet. App. 11a n.7. The Board did in fact discipline Mrs. Ibanez, thereby indisputably exercising jurisdiction over her conduct. Thus, Mrs. Ibanez cannot have *falsely* conveyed the message that she "will be regulated" by the Board. *See* Pet. App. 13a.

Nor can any other plausible justification be gleaned from the Board's opinion. In particular, the result here cannot be justified by the Board's single oblique suggestion, in a footnote, that a CPA's use of the designation may be misleading unless the CPA is actually in compliance with all "provisions of Section 473 and the rules promulgated thereto." Pet. App. 11a n.7.

That plainly is not the basis for the Board's action here because the record contains no evidence that Mrs. Ibanez has failed to comply with the substantive requirements of Section 473. Although DPR initially alleged one such

[10] The Florida Bar expressly permits attorneys to hold out as CPAs. *See* Florida Bar Ethics Opinion 88-9.

substantive violation—that Mrs. Ibanez violated 473.309 and 473.3101 by practicing public accounting while affiliated with an unlicensed firm—the allegation was expressly withdrawn prior to the administrative hearing. As the Hearing Officer concluded, "Ibanez could not be held in this proceeding to have violated those statutory provisions." Pet. App. 46a.[11] That leaves only the Board's suggestion that Mrs. Ibanez does not "forego certain forms of remuneration denied to individuals who are practicing public accountancy." Pet. App. 11a. Presumably, the Board was referring to Section 473's ban on CPAs receiving contingent fees. But the record contains absolutely no evidence that Mrs. Ibanez ever accepted such forms of remuneration.[12]

In any event, this alternative justification cannot save the Board's decision because the "substantive" provision Mrs. Ibanez allegedly violated is itself an unconstitutional restriction on commercial speech. The allegation that Mrs. Ibanez "'practiced public accounting" while affilated with an unlicensed firm is, at bottom, a claim that she violated an additional restriction on using the CPA designation. It is undisputed that CPAs may perform many types of accounting services while affiliated with unlicensed firms. Findings ¶¶ 12, 15; Pet. App. 28a. It is also undisputed that *all* of the accounting services Mrs. Ibanez provides in the course of her law practice are non-attest services that may legally be provided by CPAs in unlicensed firms. The only substantive restriction Florida

[11] The Board abandoned this contention because it is insubstantial. Florida law requires corporations or partnerships that practice public accounting to obtain a separate license, and forbids them from practicing public accounting without a license. § 473.309. A partnership or corporation is eligible to be licensed if every member of the partnership or every shareholder is a CPA. Obviously, Mrs. Ibanez's law firm meets that criterion because she is a sole practitioner. Thus, at most, Mrs. Ibanez had not yet applied for a separate partnership license to which she was clearly entitled.

[12] The Board's brief in opposition to the petition for certiorari made no mention of this argument.

imposes on CPA's who, like Mrs. Ibanez, perform these non-attest services while affiliated with unlicensed firms is that they refrain from *holding out* as CPAs.[13] Thus, when the Board alleged that Mrs. Ibanez was unlawfully "practicing public accounting" while affiliated with an unlicensed firm, that was not a claim that she had performed any *services* she could not legally perform while affiliated with an unlicensed firm. Rather, it was a claim that, in addition to performing services she *could* legally provide while affiliated with an unlicensed firm, she held out as a CPA. The "substantive" provision at issue here thus aims directly at "holding out" by CPAs affiliated with unlicensed firms.

To justify this additional restraint on the use of the CPA designation, the Board would have to demonstrate that the restraint directly advances a substantial interest in preventing misleading speech, and is narrowly tailored. The Board has not even begun to meet that additional burden with respect to the alleged "substantive" violation. Thus, the purportedly "substantive' violation on which the Board's alternative theory appears to be premised is nothing more than another indefensible restriction on commercial speech. As this Court has made clear, a State may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1986).

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[13] Mrs. Ibanez is not practicing public accounting unless, in addition to performing non-attest services, she holds out as a CPA. *See* Rule 21A-20.011(3); Fla. Admin. Code § 61H1-20.011(3). She would thus violate the prohibition on "practicing public accounting" in an unlicensed firm only if she held out as a CPA. This restriction, therefore, is not a substantive restriction on her conduct at all. It is another restriction on holding out, one that would appear to forbid CPAs affiliated with unlicensed firms from truthfully advertising their CPA status, even though they perform non-attest services.

In this case, as in *Edenfield v. Fane*, the Florida Board of Accountancy has failed to "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." 113 S. Ct. at 1800. The Board's prohibition on holding out by CPAs such as Mrs. Ibanez cannot be sustained.

C. The Absolute Prohibition on Mrs. Ibanez Using the CPA Credential Is Not A Narrowly Tailored Means of Advancing the State's Objectives.

Even if Mrs. Ibanez's use of the CPA credential posed a material risk of misleading the public—and it does not—that risk could be entirely eliminated through the use of simple disclaimers. "[T]he States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive." *In re R.M.J.*, 455 U.S. at 203. *See also Fane*, 113 S. Ct. at 1800-02; *Peel*, 496 U.S. at 111; *Shapero*, 486 U.S. at 473-78; *Zauderer*, 471 U.S. at 644-49; *Bates*, 433 U.S. at 372-74.

If the problem is that Mrs. Ibanez is offering accounting services in the context of a law firm that is not independently licensed with the Board of Accountancy, a disclaimer could inform the public that Mrs. Ibanez's law firm is not independently licensed as CPA firm. If the problem is that consumers will wrongly assume that Mrs. Ibanez provides all accounting services, a simple disclaimer could easily dispel any such misconception. Thus, the State cannot impose a flat prohibition on attorneys holding out as CPAs.

III. THE FIRST AMENDMENT PROHIBITS THE STATE OF FLORIDA FROM PUNISHING MRS. IBANEZ FOR USING THE CFP DESIGNATION.

Peel establishes that the use of the word "certified" is not inherently misleading in the sense that the public will necessarily assume that certification is state-conferred. In the present case, the Board produced no evidence—empirical, documentary or testimonial—demonstrating that use of the CFP designation misleads the public in this way. Rather, the Board asserted as a matter of law that "the use, by a CPA, of any of the terms set forth in Rule 21A-24.001(1)(i) when those terms have not been approved by the Board is inherently misleading." Pet. App. 19a. However, the Board's position plainly violates the bedrock rule that "States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive." *In re R.M.J.*, 455 U.S. at 203; *Fane*, 113 S. Ct. at 1800-02; *Peel*, 496 U.S. at 111; *Zauderer*, 471 U.S. at 644-49; *Bates*, 433 U.S. at 372-74.

If the Board fears that use of the CFP designation will mislead the public as to whether the specialty is state-recognized, this can be cured by a simple disclaimer. Indeed, Board generally permits disclaimers of exactly this kind for most unrecognized specialties. *See* Rule 21A-24.00(1)(g); Fla. Admin. Code § 61H1-24.001(1)(g). Yet, despite the Board's recognition that disclaimers work, and this Court's repeated rulings that the preferred remedy for potentially misleading speech is more speech rather than suppression, the Board did not even consider whether a disclaimer might alleviate the potential for confusion it has identified. Instead, the Board chose simply to ban the dissemination of expression that may be extremely useful to consumers who need estate or financial planning advice and want the assurance of accounting competence that a CPA designation provides.

The Board's ban on use of the CFP designation by CPAs thus fails to carefully calculate the cost of regulation, and must be invalidated.

CONCLUSION

The judgment of the District Court of Appeal of Florida should be reversed.

Respectfully submitted,

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No. 93-639

Supreme Court, U.S.
FILED
FEB 28 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

SILVIA S. IBANEZ,

Petitioner,

v.

STATE OF FLORIDA,
DEPARTMENT OF PROFESSIONAL REGULATION,
BOARD OF ACCOUNTANCY,

Respondent.

On Writ Of Certiorari
To The District Court Of Appeal
Of Florida For The First District

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION OF ATTORNEY-CERTIFIED PUBLIC ACCOUNTANTS, INC. IN SUPPORT OF PETITIONER

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No. 93-639

In The

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October Term, 1993

SILVIA S. IBANEZ,

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STATE OF FLORIDA,
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Respondent.

On Writ Of Certiorari
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Of Florida For The First District

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION OF ATTORNEY-CERTIFIED PUBLIC ACCOUNTANTS, INC. IN SUPPORT OF PETITIONER

CONSENT OF THE PARTIES

Petitioner, Silvia S. Ibanez, and Respondent, State of Florida, Department of Professional Regulation, Board of Accountancy, have consented to the participation of the American Association of Attorney-Certified Public Accountants, Inc. in these proceedings as amicus curiae in support of Petitioner. Their consents have been filed with this Court.

INTEREST OF AMICUS CURIAE

The American Association of Attorney-Certified Public Accountants, Inc. ("AAA-CPA" or "the Association") is a not-for-profit corporation, formed in 1964 and now headquartered in California, with members located all over the United States. Every member has been licensed as both an attorney and a certified public accountant ("CPA").

AAA-CPA is dedicated to ensuring that its members observe the highest professional and ethical standards in service to their clients and the public. At the same time, AAA-CPA supports the right of practitioners to disclose truthful information about their qualifications, and to engage in the practice of either or both of their professions.

AAA-CPA is active in advocating the rights of individuals, such as its members, who are dually licensed both as attorneys and as CPAs. The Association asserts the right of these individuals to identify themselves as being licensed to practice both professions, and to engage in the practice of either or both, provided these individuals comply with the applicable standards of professional conduct.

AAA-CPA is in a unique position to appreciate the differences between the professional duties of attorneys on the one hand and CPAs on the other. Because of these differences in professional duties, the state has a legitimate interest in regulating each profession by a distinctive set of standards. These standards are similar in some respects and different in others. Depending on the nature of the engagement, dual licensees must comply with one

set of standards, or the other, or both. Dual licensees can discern and conform to the applicable set of standards, in much the same way as attorneys engaged in the multistate practice of law can discern and conform to the standards of each applicable jurisdiction.

Although one set of standards governs attorneys and another set governs CPAs, a single pervasive principle applies with equal force to the regulation of each profession: The state should impose no restriction unless required by the public interest. When the regulation affects truthful speech, the applicable test is even more stringent: The state should impose restrictions only in narrowly defined situations and only in response to a demonstrated need to protect a substantial public interest.

In the decision in this case, the Florida Board of Accountancy reprimands Silvia Ibanez for identifying herself as a CPA and CFP (Certified Financial Planner), although she is in fact a CPA, a CFP, and an attorney. The Board's actions violate Ibanez's First Amendment rights and endanger the rights of all practitioners who hold more than one professional license. AAA-CPA supports the position of Ibanez, in asking this Court to reverse the judgment of the Florida District Court of Appeal which, without opinion, affirmed the Board's decision.

SUMMARY OF ARGUMENT

The Board violates Ibanez's commercial speech rights by imposing discipline for her truthful and verifiable listing of professional credentials. The Board improperly

characterizes Ibanez's listing of the credential "CPA" as "deceptive," although the Board concedes she is licensed as a certified public accountant. The Board bases its action on speculation that Ibanez, in the conduct of her law practice, may violate the Board's rules on the management of public accounting practices. By listing her professional credentials, however, Ibanez makes no representation regarding the regulatory regime that applies to her.

The Board's action chills the First Amendment rights of all attorney-CPAs and other individuals who hold more than one professional license. Experience shows that the public interest can be effectively protected without impairing First Amendment rights.

This Court should maintain the protection of commercial speech, and clarify it to the extent required to provide relief to Ibanez.

ARGUMENT

In the decision at issue in this case, the Florida Board of Accountancy ("the Board") reprimands Silvia Ibanez ("Ibanez") for identifying herself as a Certified Public Accountant ("CPA") and a Certified Financial Planner ("CFP"), although the Board concedes she is a CPA, a CFP, and an attorney.

This brief of amicus curiae, the American Association of Attorney-Certified Public Accountants, Inc. ("AAA-CPA"), focuses on Ibanez's right to identify herself as a CPA. By focusing on this issue, the brief avoids needless

overlap with the brief of another amicus curiae which focuses on Ibanez's right to identify herself as a CFP.[1]

The Board improperly characterizes Ibanez's truthful and verifiable identification – as a CPA – as "deceptive, false and misleading." This characterization is based only on the Board's speculation that Ibanez may violate the rules which, according to the Board, require her to license her law firm as a CPA firm, to forego certain forms of remuneration, and to limit the ownership of the firm to other CPAs. Joint Appendix ("J.A.") at 185. By characterizing truth as deception and by imposing discipline on this basis, the Board impairs Ibanez's First Amendment rights and endangers the rights of all practitioners who hold more than one professional license.

I. THE BOARD VIOLATES IBANEZ'S COMMERCIAL SPEECH RIGHTS BY IMPOSING DISCIPLINE FOR HER TRUTHFUL AND VERIFIABLE LISTING OF PROFESSIONAL CREDENTIALS

In its order reprimanding Ibanez, the Board acknowledges that she is licensed as a CPA. The Board concludes,

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[1] The International Board of Standards and Practices for Certified Financial Planners, Inc. (IBCFP) filed a brief as amicus curiae in support of Ibanez's petition for writ of certiorari. IBCFP is expected to file an amicus curiae brief on the merits in support of Ibanez's right to identify herself truthfully as a CFP. AAA-CPA joins IBCFP in supporting her right to do so, based on commercial speech decisions such as *Peel v. Attorney Registration and Disciplinary Commission*, 496 U.S. 91 (1990) and *Edenfield v. Fane*, 507 U.S. ___, 113 S. Ct. 1792 (1993).

however, that her truthful and verifiable identification as a CPA is "deceptive, false and misleading." J.A. at 186. This conclusion violates Ibanez's First Amendment right to engage in commercial speech.

A. The Board Misapplies Case Law

The Board's order cites a number of cases to justify its action. The Board's reliance on these cases is misplaced.

1. This Court's cases on commercial speech

First, the Board relies on this Court's decisions in *Peel v. Attorney Registration and Disciplinary Commission*, 496 U.S. 91 (1990), *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n. of New York*, 447 U.S. 557 (1980), and *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989). For reasons stated in Ibanez's brief, none of the above decisions support the Board's action.

The Board's decision is further undermined by this Court's subsequent decision in *Edenfield v. Fane*, 507 U.S. ___, 113 S. Ct. 1792 (1993), also discussed in Ibanez's brief. To avoid needless overlap, this amicus curiae brief will not further discuss these cases.

In its Brief in Opposition to Certiorari, the Board relies also on *Friedman v. Rogers*, 440 U.S. 1 (1979). The Board's reliance on this case is equally erroneous. *Friedman* arose from a prohibition against the use of potentially deceptive trade names. This Court distinguished trade names from other commercial speech, noting that

trade names have "no intrinsic meaning." 440 U.S. at 12. In contrast, Ibanez listed her own name, together with professional credentials that have a clear meaning and are in no way deceptive. Accordingly, *Friedman* provides no justification for the Board's decision.

2. Other courts' cases on title acts

The Board relies also on a number of lower court decisions arising from statutes described as "title acts," which prohibit unlicensed persons from using professional titles. J.A. at 181, 184, 189. None of these cases, however, supports the Board's position.

The Board relies on *Abramson v. Gonzalez*, 949 F.2d 1567 (11th Cir. 1992) (state may prohibit unlicensed psychologist from identifying publicly as "licensed psychologist," but same individual has First Amendment right to identify publicly as "psychologist"); *Accountants' Society of Virginia v. Bowman*, 860 F.2d 602 (4th Cir. 1988) (state may prohibit unlicensed accountant from identifying publicly as "certified public accountant," "CPA," or "public accountant"); *Smith v. California*, 336 F.2d 530 (9th Cir. 1964) (state may prohibit unlicensed engineer from identifying publicly as "electrical engineer" or "consulting engineer").

These three cases uphold the right of a state legislature to prohibit *unlicensed* persons from using certain professional titles. That proposition is not disputed in the present case. None of the cases relied on by the Board allow the state to prohibit a *licensed* person from using

her titles. Accordingly, the cases do not support the Board's order.

In its Brief in Opposition to Certiorari, the Board relies on two additional lower court cases: *Gandee v. Glaser*, 785 F. Supp. 684 (S.D. Ohio 1992) and *United States v. DeFusco*, 930 F.2d 413 (5th Cir.), *cert. denied* ___ U.S.___, 112 S. Ct. 239 (1991). Its reliance on these cases is equally misplaced. *Gandee* upheld the right of the state to prohibit unlicensed persons from identifying themselves as "audiologists," while *DeFusco* upheld the right of the United States to prosecute a person for distributing material that misled the addressees into believing they had won a contest. Neither *Gandee* nor *DeFusco* pertains in any way to Ibanez's right to list her professional credentials truthfully.

B. Ibanez's Truthful and Verifiable Listing of Credentials Is Not A Representation Regarding the Regulatory Regime Governing Her Practice

The independent hearing officer who conducted the trial-type hearing concluded that Ibanez's listing of her credentials was not misleading or deceptive. J.A. at 184. The Board rejected the hearing officer's recommendation and concluded, to the contrary, that Ibanez's listing of her credentials was "deceptive, false and misleading." J.A. at 186. In essence, the Board's explanation for its action has two components: (1) By publicly identifying herself as a CPA, Ibanez represents to the public that she will comply with all of the Board's rules; and (2) the Board speculates that Ibanez may violate some of its rules on the management of public accounting practices. In the Board's own words, J.A. at 185:

> Respondent [Ibanez] has, in effect, told the public that she is subject to the provisions of Chapter 473 [the Florida Accountancy Law], and the jurisdiction of the Board of Accountancy when she believes and acts as though she is not [footnote omitted].

1. Truthful and verifiable, not deceptive

The Board's explanation is untenable. By publicly identifying herself as a CPA, Ibanez merely represents that she now holds a valid license which authorizes her to use that title. Since the Board concedes that she holds a valid license, the Board has no basis for impairing her right to identify herself publicly as a CPA, or for characterizing her identification as deceptive. Her public identification is truthful.

It is also easily verifiable. Any interested person can consult public records or place a telephone call to the Board to verify that Ibanez is indeed a CPA, and to ascertain the legal significance of that license. Ibanez's public identification as a CPA is therefore a truthful and verifiable statement, protected by the First Amendment. *Peel, supra; In re R.M.J.*, 455 U.S. 191 (1982).

2. Public identification, not representation regarding regulatory regime

Ibanez's public identification as an attorney and a CPA is not a representation regarding the regulatory regime governing her professional practice. Defining the appropriate regime may be a complex matter which cannot feasibly be conveyed by the listing of professional credentials.

For example, a person licensed as both an attorney and a CPA obviously may not serve the same client as both legal counsel and independent auditor, because of the different professional roles of counsel (as advocate and adviser) and auditor (as independent examiner). The dual licensee must therefore decline to accept engagements that would violate this principle, while remaining free to accept the wide range of other engagements in which attorney-CPAs may properly and usefully serve their clients. But the need to decline certain engagements has no bearing on the right of a person licensed as both an attorney and a CPA to use these credentials as a means of public identification. A dual licensee cannot feasibly be required to describe the need to decline certain engagements when publicly listing professional credentials.

Dual licensees face other issues, some of them more complex. One source of complexity arises because in Florida, as in all other states, attorneys are regulated by the state Supreme Court while CPAs are regulated by the Board, an administrative agency. In the event of conflict between these two sources of regulation, issues may arise under the separation of powers provision of the state constitution. The potential emergence of these issues, however, has no bearing on Ibanez's right to identify herself truthfully as an attorney and a CPA. And in listing her professional credentials, Ibanez cannot feasibly be required to describe or discuss issues such as separation of powers.

C. The Board Improperly Bases Its Decision on Speculation That Ibanez, in the Conduct of Her Law Practice, May Violate the Board's Rules on the Management of Public Accounting Practices

The Board's order speculates that Ibanez, in the conduct of her law practice, may violate its rules on the management of public accounting practices. Mere speculation, however, is not a sufficient justification for restricting Ibanez's commercial speech.

If the Board has sufficient reason to do so, it may bring formal charges against Ibanez, accusing her of past or continuing violations of specific rules on the management of public accounting practices. She will then receive the elaborate procedural protections of the Florida Administrative Procedure Act as well as the due process guarantees of the state and federal constitutions. In these proceedings she will have the opportunity to raise her defenses, including any appropriate challenge to the Board's jurisdiction to enforce its rules against the law practice of a CPA who is not engaged in the practice of public accounting.

If the Board finds, in such proceedings, that it has jurisdiction over Ibanez's law practice, and that Ibanez has indeed violated specific rules, the Board may impose the discipline authorized by statute, subject to judicial review. If that discipline consists of the revocation of her license, she will then be prohibited from identifying herself as a CPA. Until then, Ibanez is a CPA and is entitled to identify herself as one.

II. THE BOARD CHILLS THE FIRST AMENDMENT RIGHTS OF ATTORNEY-CPAs AND OTHER MULTIPLE LICENSEES

The Board's action against Ibanez has a chilling effect on the First Amendment rights of attorney-CPAs and other multiple licensees. Experience has shown that the public interest can be effectively protected without impairing the First Amendment rights of practitioners. Consequently, the Board's restriction of commercial speech is not narrowly tailored to serve a valid state interest.

A. The Board Chills the Right of Attorney-CPAs to List Their Professional Credentials Truthfully

During the 30 years of AAA-CPA's existence as well as in earlier times, attorney-CPAs have faced two types of restrictions – on their right to practice both professions and on their right to identify their credentials in both professions. Gradually, the contours of an appropriate regime for multiple licensees have emerged. Although some restrictive attitudes remain, the current consensus reflects a significant trend toward the greater accommodation of multiple licensees.

The Florida Board's action against Ibanez signals a return to the restrictive policies of the past. These policies have been abandoned by bar regulators (in Florida as well as elsewhere) and by accounting regulators (in other states, but not in Florida).

If the Florida Board's action is allowed to stand, attorney-CPAs in Florida will not be able to list their CPA credentials unless they accept the Board's jurisdiction to

enforce the entire accountancy law against their law practices. This will be the result even for attorney-CPAs who, like Ibanez, choose to limit themselves to the practice of law.

As stated in the Board's order in this case, compliance with the accountancy law requires, among other matters, registration as a CPA firm, foregoing certain types of remuneration (such as contingent fees), and limiting the ownership of the firm to other CPAs. J.A. at 185. By demanding compliance with the accountancy law as the price to pay for listing one's CPA credential, the Board seeks to transform a law practice into a fully regulated accounting firm merely because an attorney-CPA lists her CPA credentials. This is an intolerable burden to place on the exercise of commercial speech. It will chill the exercise of First Amendment rights by attorney-CPAs. It will, in addition, tend to discourage practitioners who currently hold one professional license from seeking to qualify for a second license in another profession. The public interest is disserved by sapping ambition from those who wish to expand their professional qualifications.

The Board's burden on commercial speech is not only intolerable; it is also completely unnecessary. Experience shows that effective regulation is possible without imposing this burden on commercial speech.

B. Bar Regulators and Other States' Accounting Regulators Effectively Protect the Public Interest Without Chilling the First Amendment Rights of Attorney-CPAs

Until 1980, the restrictions against attorney-CPAs came primarily from the American Bar Association (ABA). Since then, the restrictions have come from the accountancy boards of a few states, primarily Florida, while other states have reached reasonable accommodations with attorney-CPAs.

1. ABA abandoned its repressive policies toward CPAs in 1980

Starting in 1932, ABA interpretations of the 1908 Canons of Professional Conduct prohibited attorneys from engaging in other businesses. ABA Informal Op. 1422 (1978) (historical summary). The clear purpose of these prohibitions was to prevent the non-law business from "feeding" clients to the law practice.

Many states chose to ignore the ABA's position on this issue. See, for example, New York County Lawyers' Ass'n. Committee on Professional Ethics, Answer to Question 388 (1949), 122 N.Y.L.J. 1088 (1949), 89 J. Acctcy. 71 (1950) (allowing attorney-CPAs to practice both professions in the same office, noting this result was contrary to ABA opinions). In support of the New York County ethics opinion, a commentator observed:

> The combination in one person of the functions of lawyer and accountant, representing the ultimate degree of cooperation between the two professions, would give the client the advantage of more continuous and timely professional supervision. This feature would seem especially valuable to the small businessman who can afford only limited professional assistance.

Note, *Attorneys Who Are Also Certified Public Accountants May Properly Practice Both Professions in the Same Office*, 63 Harv. L. Rev. 1457, 1458 (1950).

The ABA adopted the Model Code of Professional Responsibility in 1969 (effective January 1, 1970). The Model Code included a Disciplinary Rule, DR 2-102(E), representing a significant departure from the ABA's prior position. DR 2-102(E) allowed an attorney to engage in another profession or business, subject to one proviso – the lawyer could not identify the other business or profession on the letterhead, office sign, or professional card of the law practice, nor could the lawyer be identified as a lawyer in any publication in connection with the other business or profession. Thus the ABA Model Code permitted dual practice but prohibited identification as a dual practitioner.

In 1977 this Court decided *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), conferring First Amendment protection on certain types of advertising by lawyers. In the aftermath of Bates, the ABA overhauled its rules on advertising. At first DR 2-102(E), prohibiting identification as a dual licensee, was left intact. In 1980, however, the ABA repealed DR 2-102(E), apparently in the belief that the rule was incompatible with *Bates*. ABA, Proceedings of 1980 Mid-Year Meeting, 105 *ABA Annual Reports* 287, 341 (1985).

The ABA Model Rules of Professional Conduct, adopted in 1983 to replace the Model Code, include no

prohibition against identification as dual licensee. ABA Informal Op. 83-1497, n.2 (1983) (commenting on this aspect of the then-pending Model Rules).

State courts and bar ethics committees have generally adopted the permissive stance now taken by the ABA.[2]

During the past decade, dual licensees have encountered few if any restrictions from bar regulators. Significantly, The Florida Bar has not objected to Ibanez's identification as CPA and CFP in the telephone yellow pages under the heading "Attorneys." Only the Florida Board of Accountancy objects; the Board's reprimand precipitated the present lawsuit.

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[2] Examples include: Mass. Bar Ass'n. Committee on Professional Ethics, Op. No. 82-2 (Dec. 1982), THE ATTORNEY-CPA, Winter 1983, at 1 (references to a lawyer's dual professional status as an attorney and certified public accountant on his business card do not violate rules governing lawyers); Mich. Bar Committee on Professional and Judicial Ethics, Op. CI-795 (1983), THE ATTORNEY-CPA, Summer 1983, at 7 (a certified public accountant who is also an attorney may list both licenses on his professional card, letterhead and office sign); Texas State Bar Assn. Op. 406 (1983), THE ATTORNEY-CPA, Winter 1984, at 1 (a lawyer who is also a CPA may show the accounting qualification on his law firm's letterhead and on his professional card); New Jersey Advisory Committee on Professional Ethics, Op. 589 (1986), 22 THE ATTORNEY-CPA, No. 3, Sept./Oct. 1986, at 1 (the designation "C.P.A." may be used on the letterhead of an attorney who is also a certified public accountant – overruling contrary conclusion in Op. 447 [1980], because State Supreme Court repealed rule on which Op. 447 was based).

2. Three states exempt attorneys from accountancy act

While Florida leads the nation in repressing the truthful speech of CPAs, other states accommodate attorney-CPAs in varying degrees.

Three states have enacted statutes declaring that the accountancy law does not apply to an attorney in connection with that person's law practice.[3]

These statutes respect the separation of powers of their respective state constitutions, leaving the state courts to regulate the practice of law while the state boards of accountancy regulate the practice of public accounting. AAA-CPA is not aware that any of these states have suffered any danger to the public interest, or have even received any complaints, resulting from these statutes.

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[3] Calif. Bus. & Prof. Code Sec. 5053 (1990): "Nothing herein shall be deemed to be applicable to an attorney at law in connection with his practice." [in Division 3, Professions and Vocations, Chapter 1, Accountants].

Mich. Comp. L. Ann. Sec. 339.711 (1992): "This article shall not prevent the following: . . . (c) A practicing attorney from preparing reports or presenting records customarily prepared by an attorney in connection with the attorney's professional work." [in Article 7, Public Accounting].

Wis. Stat. Ann. Sec. 442.02(8) (1988): "Nothing contained in this chapter shall apply to a practicing attorney who, in connection with his or her professional work renders any accounting service." [in Ch. 442, Accounting Examining Board].

3. Accounting regulators in many other states have reached practical accommodations with attorney-CPAs

In 1946, the American Institute of Accountants ("AIA," predecessor of the American Association of Certified Public Accountants, "AICPA") endorsed the right of attorney-CPAs to practice both professions. American Institute of Accountants, Committee on Professional Ethics, *Official Text*, May 8, 1946, 83 J. ACCTCY. 171 (1947). At the time, AIA prohibited CPAs from advertising, as did state boards and voluntary societies of CPAs throughout the country.

After *Bates*, states could no longer prohibit advertising. After an extended dispute with the Federal Trade Commission, AICPA entered into a consent decree in 1990, agreeing to refrain from taking any action restricting or interfering with "[t]he solicitation of any client by any means . . . " FTC, Notice of Consent Decree (American Institute of Certified Public Accountants), 55 Fed. Reg. 40944 (Oct. 5, 1990).

On the basis of AAA-CPA's anecdotal knowledge, it appears that many states have developed reasonable accommodations with attorney-CPAs, reflecting a combination of the 1946 AIA policy and this Court's First Amendment case law. The Florida Board's action in the present case is not supported by any reported precedent, and is clearly out of step with the prevailing approach taken by other state boards.

4. Uniform Accountancy Act and Proposed Rules have attracted new attention to regulation of attorney-CPAs

Interest in the relationship between state boards of accountancy and attorney-CPAs was recently heightened by publication of the Uniform Accountancy Act. American Institute of Certified Public Accountants & National Association of State Boards of Accountancy, *Uniform Accountancy Act* (1992), 1 C.C.H. Accountancy L. Rptr. par. 1031 (looseleaf). In October 1993, the same organizations invited comments on Proposed Rules to Accompany the Uniform Accountancy Act. The Uniform Accountancy Act and the Proposed Rules are now under serious consideration in a number of states.

a. "Holding out" under Uniform Act and Proposed Rules

The Uniform Accountancy Act purports to apply, in its entirety, to CPAs who are engaged in the practice of public accountancy. Section 3(g) includes a definition of the practice of public accountancy that relies on a "holding out" rule.[4] The Proposed Rules to accompany the

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[4] Section 3(g) of the Uniform Accountancy Act defines "Practice of (or practicing) public accountancy" to mean "the performance or the *offering to perform* by a person or firm *holding itself out to the public* as a licensee, for a client or a potential client, of one or more kinds of services involving the use of accounting or auditing skills, including the issuance of reports on financial statements, or of one or more kinds of management advisory, financial advisory or consulting services, or the preparation of tax returns or the furnishing of advice on tax matters." (emphasis added)

Uniform Act define "holding out" to include any listing, letterhead, or other representation of the fact that a licensee holds a certificate.[5]

b. AAA-CPA critique

These Proposed Rules give cause for concern. In context of the Uniform Act, they purport to make the entire accountancy law apply to licensees who merely identify themselves as CPAs, even if those licensees render no accounting services at all, or render accounting services only incidentally in connection with the practice of law or another profession. Further difficulty arises in defining "accounting services," especially with regard to the many overlapping areas between the practice of law and the practice of accounting.

In December 1993, AAA-CPA submitted comments and suggestions to AICPA and the National Association of State Boards of Accountancy ("NASBA"). American Association of Attorney-Certified Public Accountants, Committee on Cooperation Between the Professions of Accountancy and Law, *Comments on Uniform Accountancy Act (1992) and Proposed Rules to Accompany the Act (1993),*

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[5] AICPA/NASBA Proposed Rules to Accompany Uniform Accountancy Act, Exposure Draft Oct. 1, 1993, Rule 3-3: "Holding out" includes "any representation of the fact that a licensee holds a certificate . . . [A] representation shall be deemed to include any oral or written communication conveying the fact that the licensee holds a certificate . . . , including without limitation the use of titles or legends on letterheads, business cards, office doors, advertisements and listings."

29 THE ATTORNEY-CPA, No. 5, at 6 (Year End 1993) ("AAA-CPA critique").

The AAA-CPA critique suggests some alternative standards or concepts, without attempting to put them into statutory or regulatory language. According to the AAA-CPA critique, in summary: "[A] CPA [should] be partially exempt from the Uniform Accountancy Act if the CPA (1) does not perform accounting services at all, or (2) performs such services only incidentally to the practice of law. Further, we suggest a narrow definition of 'perform,' so that the term will not include merely identifying oneself as a CPA." *Id.*

The AAA-CPA critique is noted here to illustrate the type of dialogue that should take place in order to develop a reasonable regulatory framework for attorney-CPAs and other dual licensees. Instead of contributing to this developmental process, however, the Florida Board has chosen to repress the commercial speech of a dual licensee.

5. Florida position is more repressive than Uniform Act and Proposed Rules

Even the Uniform Accountancy Act and the AICPA/NASBA Proposed Rules do not support the position of the Florida Board in the present case. The AICPA/NASBA Proposed Rules address the question of a board's regulatory jurisdiction, suggesting that a CPA who advertises her credentials is subject to regulation by the state board of accountancy.

The Florida Board, in contrast, has gone much further. In an effort to assert its jurisdiction over Ibanez's law practice, the Board has reprimanded Ibanez for the so-called "deceptive" listing of her CPA credential. Thus the Board has equated its claim to exercise jurisdiction with its claim to repress the truthful and verifiable listing of Ibanez's CPA credential. The AICPA/NASBA Proposed Rules do not remotely support the Florida Board's action in this case.[6]

C. The Board Can Accomplish Its Legitimate Regulatory Purposes Without Impairing First Amendment Rights

The Board has ample means for accomplishing its legitimate regulatory purposes without impairing Ibanez's First Amendment rights.

1. Board has power to prohibit deceptive speech, but has misused that power in this case

The Board's power to prohibit deceptive speech is clearly based on a legitimate regulatory interest. The

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[6] The Board's position is vigorously supported by Lloyd "Buddy" Turman & Kenneth R. Hart, *When You Say You're A CPA, You Must Play By The Rules . . . All The Rules*, 29 THE ATTORNEY-CPA, No. 1, at 6 (Winter 1993), *reprinted from* Florida CPA Today, Oct. 1992, at 8. (Mr. Turman is Executive Director of the Florida Institute of Certified Public Accountants; Mr. Hart is General Counsel of the same organization.)

Two of the authors of the present amicus curiae brief wrote criticisms of the Turman/Hart article: Sydney S. Traum, *The Public's Right to Know*, 29 THE ATTORNEY-CPA, No. 1, at 6 (Winter 1993); Philip D. Brent, *Is the FICPA Playing By The Rules?*, 29 THE ATTORNEY-CPA, No. 2, at 7 (Spring 1993).

Board, however, violated Ibanez's First Amendment rights by a completely unjustified exercise of this power – the imposition of discipline for the so-called "deceptive" listing of truthful and verifiable information about her professional credentials.

The Board persists in attempting to justify its disciplinary action against Ibanez, apparently ignoring two recent cases which struck down the Board's violations of First Amendment rights: *Edenfield v. Fane*, 507 U.S. ___, 113 S. Ct. 1792 (1993) (Board's anti-solicitation rule held invalid as applied to truthful, non-coercive solicitation in the business context); *Dep't. of Professional Regulation, Board of Accountancy v. Rampell*, 621 So.2d 426 (Fla. 1993) (Board's anti-competitive bidding rule held invalid).

2. Board's interest in regulating law practice of CPA is questionable

In addition to regulating deceptive speech, the Board has other legitimate interests in regulating the profession of public accounting. The Board's interests are at their highest level as regards CPAs who are engaged full-time in rendering accounting services to the public. The Board's regulatory interest decreases as regards CPAs who do not practice public accounting at all, or who do so only as an incident to the practice of another profession. The precise scope of the Board's legitimate interest in regulating Ibanez's law practice is a question of state law.

3. Board has avoided any direct test of its asserted jurisdiction over law practice of CPA

As noted above, the Board has not brought disciplinary proceedings accusing Ibanez of conducting her law practice in a manner that violates the Board's rules on the management of public accounting practices. Accordingly, the Board has not given the Florida courts an opportunity to determine the scope of the Board's jurisdiction over the law practice of a CPA. Neither has the Board initiated any declaratory proceedings that could resolve the matter.

Instead of directly testing its asserted jurisdiction to regulate Ibanez's law practice, the Board seeks to do so indirectly. The Board has had a longstanding dispute with Ibanez regarding the extent of the Board's jurisdiction to regulate her law firm. Rather than bring this dispute to a judicial test, however, the Board seeks to achieve its purposes in another way – by reprimanding her for so-called "deceptive" listing of her credentials. The Board calls this listing "deceptive" solely because the public may misunderstand the scope of the Board's jurisdiction. Thus the Board misuses its power to regulate deceptive speech, thereby violating Ibanez's First Amendment rights.

4. Board has not used rulemaking to clarify its jurisdiction completely

The Board may clarify the scope of its jurisdiction by amending the definitions and exemptions contained in its rules.[7]

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[7] Fla. Stat. Ann. Sec. 473.304(1) (1991) "The Board shall adopt all rules necessary to administer this Act."

The Board has adopted rules defining the scope of the Act and conferring exemptions.[8] The Board's rule conferring these exemptions was adopted, in part, as a response to *Cenac v. Florida State Board of Accountancy*, 399 So.2d 1013 (Fla. 1st Dist. Ct. App. 1981). Among other matters, the *Cenac* court recognized the Board's power to define "Florida practitioner" so as to render a licensee partially exempt from the Act if that person did not "hold out" as a CPA.

Having already adopted rules conferring partial exemption from the Act on CPAs who do not "hold out," the Board is clearly authorized to adopt additional rules, conferring partial exemption on other categories of licensees. It has not done so.

Fla. Stat. Ann. Sec. 473.323(2) (1991) "The Board shall specify, by rule, what acts or omissions constitute a violation of subsection (1) [grounds for disciplinary action]."

[8] Fla. Admin. Code, Rule 21A-20.011. Practice of, or practicing public accountancy. "Practice of, or practicing public accountancy" as defined in Sec. 473.302(4), F.S. shall exclude any of the following:

(1) Services rendered by a licensee as an employee of a governmental unit or an employee rendering accounting services only to his employer as long as that employer is not required to be licensed under F.S. 473, or

(2) Activities of licensees who do not hold themselves out as CPAs and who are not associated with financial statements, or

(3) Activities of licensees who do not hold themselves out as certified public accountants."

5. Board's rule defining "holding out" was held invalid

In connection with the rule conferring partial exemption on CPAs who do not "hold out," the Board adopted another rule, Fla. Admin. Code, Rule 21A-20.012, defining "holding out." This definitional rule was held invalid by an independent hearing officer in *Ibanez v. Board of Accountancy*, Fla. Div. of Admin. Hearings, Case No. 91-3336R (Jan. 15, 1992) (noted in Board's order, J.A. at 182, n. 4). The Board could have appealed this decision to the Florida courts, or could have adopted a revised rule, but the Board did neither.

In summary, the Board has failed to clarify its own jurisdiction to regulate the law practices of CPAs, and the Board has avoided any step that would give the Florida courts an opportunity to address this issue. Instead, the Board has disciplined Ibanez for so-called "deceptive" advertising, consisting of the truthful and verifiable listing of her professional credentials.

D. Board Chills the Rights of Other Multiple Licensees

This brief has focused on the individual who is dually licensed as an attorney and a CPA. The significance of the present case goes further, extending to any individual who is licensed in more than one profession.

The ABA's restrictions on dual practice (until 1970) and dual identification (until 1980) applied to lawyers who engaged in *any other* business or profession. See, for

example, ABA Informal Op. 1248 (1972) (lawyer-psychologist), ABA Informal Op. 83-1497 (1983) (lawyer-physician), ABA Informal Op. 1422 (1978) (lawyer in another profession or business); ABA 1980 Mid-Year Proceedings, supra (lawyer-Ph.D.). While the ABA no longer imposes these restrictions, this history illustrates various other professions in which lawyers have engaged.

III. THIS COURT SHOULD MAINTAIN AND CLARIFY ITS PROTECTION OF COMMERCIAL SPEECH

The public interest is well served by this Court's protection of commercial speech. This Court should maintain that protection and clarify its scope.

A. This Court's Protection of Commercial Speech Continues to Serve the Public Interest

This Court's decisions in *Bates* and subsequent cases recognize the First Amendment right of lawyers and members of other professions to advertise, provided the advertisement relates to lawful conduct and is not deceptive or coercive. These cases serve the public interest by assuring the free flow of commercial speech. At the same time, practitioners benefit from the opportunity to describe their qualifications and services.

Recently the staff of the Federal Trade Commission summarized the benefits of advertising by professionals. Such advertising:

> informs consumers of options available in the marketplace and encourages competition among firms seeking to meet consumer needs. . . .

> Advertising may sometimes be unfair or deceptive or may violate other legitimate goals of public policy. But truthful advertising is generally beneficial and procompetitive.

FTC Staff Comments, *In the Matter of Amendments to the Mississippi Rules of Professional Conduct*, FTC TODAY, Jan. 18, 1994, LEXIS pp. 9-10, *summarized in* 9 Lawyers Manual on Professional Conduct 414, 415 (1994).

B. This Court Should Maintain the Protection of Commercial Speech, and Clarify it to the Extent Required to Provide Relief to Ibanez

This Court's prior decisions on commercial speech strongly support the right of Ibanez to prevail in this case. The Court should clarify the case law on commercial speech, to the extent needed in this case, in order to uphold the right of a licensed practitioner to list truthful and verifiable information about her professional credentials. A holding to this effect would leave the state with ample authority to accomplish its legitimate regulatory purposes by other means.

Any person who has the talent, persistence and integrity to qualify for two or more professional licenses, and to retain these licenses in good standing, is put at risk by the Board's decision in the present case. The public interest is served by allowing individuals who hold multiple licenses to practice any or all of the professions in which they are licensed, and to convey truthful and verifiable information about their credentials.[9]

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[9] See, for example, Philip D. Brent, *Accounting and Law: Concurrent Practice Is In the Public Interest*, 123 J. ACCTCY., Mar. 1967, at 38; Louis S. Goldberg, *Dual Practice of Law and Accountancy: A Lawyer's Paradox*, 1966 DUKE L. J. 117; Louis S. Goldberg, *A Lawyer's Multiple Occupations*, 6 WAKE FOREST INTRAMURAL L. REV. 191 (1970); Morris W. Primoff, *The Dual Practice of Law and Accounting and the Public Interest* (Ph.D. dissertation, Calif. Western Univ., 1977, published by AAA-CPA).

Every multiple licensee faces the possibility of multiple regulation. The scope and extent of that regulation are important issues, to be resolved in the first instance by the state regulatory authorities, subject to review by the state courts. If federal constitutional rights are at issue, this Court may ultimately grant relief.

CONCLUSION

In this case, the Board speculates that Ibanez, in the conduct of her law practice, has violated some of the Board's rules on the management of public accounting practices. The Board, however, has not formally charged Ibanez with any such violation. Instead, the Board has reprimanded Ibanez for so-called "deceptive" listing of her CPA credential. The Board, in so doing, has placed an impermissible burden on the exercise of Ibanez's First Amendment rights.

The Board's decision, repressing truthful and verifiable identification of professional credentials, is contrary to the public interest and impairs First Amendment rights. For the reasons stated above, this Court should reverse the judgment of the Florida District Court of Appeal which, without opinion, affirmed the Board's decision.

Respectfully submitted,

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February 28, 1994

Supreme Court, U.S.
FILED
FEB 28 1994
OFFICE OF THE CLERK

No. 93-639

In The

Supreme Court of the United States

October Term, 1993

SILVIA S. IBANEZ,

Petitioner,

v.

STATE OF FLORIDA,
DEPARTMENT OF PROFESSIONAL REGULATION,
BOARD OF ACCOUNTANCY,

Respondent.

On Writ Of Certiorari To The District Court Of Appeal Of Florida First District

BRIEF OF AMICUS CURIAE THE FLORIDA BAR IN SUPPORT OF PETITIONER

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BRIEF OF AMICUS CURIAE THE FLORIDA BAR IN SUPPORT OF PETITIONER

CONSENT OF THE PARTIES

Petitioner, Silvia S. Ibanez, and Respondent, State of Florida, Department of Professional Regulation, Board of Accountancy, have consented to the participation of The Florida Bar in these proceedings as Amicus Curiae in support of Petitioner. Their consents have been filed with the Court. Accordingly, The Florida Bar respectfully requests that this Court accept this Amicus Curiae Brief.

INTEREST OF AMICUS CURIAE

The Supreme Court of Florida is the sole regulatory body overseeing Florida lawyers. In 1949, the Court

established a unified bar pursuant to its inherent judicial power to regulate the conduct of those lawyers practicing in Florida courts. *In re Petition of Florida State Bar Association*, 40 So. 2d 902 (Fla. 1949).[1] Pursuant to this authority, the Supreme Court of Florida adopted the Rules Regulating The Florida Bar and established The Florida Bar as an official arm of the Court. Rule 1-1, The Florida Bar, Rules Regulating The Florida Bar. The stated purpose of The Florida Bar is "to inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence." *Id.* Rule 1-2. Subject to the direction, supervision and control of the Supreme Court of Florida, the Board of Governors of The Florida Bar is given the authority and responsibility to govern and administer the Bar and to take such action as it may consider necessary to accomplish its stated purpose. *Id.* Rule 1-4.2. The officers of The Florida Bar consist of the President, President-Elect and the Executive Director. *Id.* Rule 1-5.1.

In addition the Bar is authorized to establish those committees that it deems necessary to accomplish the purposes of the Florida Bar. *Id.* Rule 1-4.3. Pursuant to this authority, the Bar established the Standing Committee on Relations Between The Florida Bar and Institute of CPAs in order "to provide an effective means of communication between The Florida Bar and the Institute of CPAs with respect to issues of common interest." While fulfilling its designated functions, this Committee became aware of the issues pending in the instant action. It undertook discussions with the Florida Institute of CPAs

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[1] At least 36 jurisdictions have unified bars while 18 jurisdictions remain voluntary. Although each jurisdiction differs in its stated function, The Florida Bar considers its mandatory core functions to be lawyer discipline, administration of a client protection fund, prevention of lawyer substance abuse, and implementing mandatory continuing legal education. *Unified State Bars/The Florida Bar*, The Florida Bar, Bar-Related Issues, Background Papers (Sept. 1993).

to seek its support for amendments to, or clarification of, the Board of Accountancy's "holding out" rules and other rules affecting those members of The Florida Bar who hold dual licensure as both lawyers and CPAs. Despite extensive efforts to achieve a consensus, the Institute remained adamant in its support of the Board of Accountancy's position herein.

At the request of the Chair of this Committee, the Bar's Executive Committee approved, and the Board of Governors ratified, the filing of an Amicus Curiae brief in the instant matter in support of Ibanez and to express the Bar's views regarding these important commercial speech and professional regulatory issues.

SUMMARY OF ARGUMENT

The decision of the District Court of Appeal of Florida, First District, which affirmed without opinion the Florida Board of Accountancy's decision to discipline Ibanez for disclosing in her yellow page attorney advertising and on her business card the fact that she is a licensed Florida CPA and a certified financial planner (CFP), should be overturned. As an attorney, Ibanez is subject to regulation by the Florida Bar, an arm of the Supreme Court of Florida. As a result, she is guided by certain aspirational, mandatory, and permissive rules regarding the scope of her practice and the type, nature, and content of her attorney advertising. Pursuant to these rules, Ibanez is expected to draw on all her relevant training, knowledge, and experience in handling clients' legal problems. In addition, she is permitted to publicly disclose any background, education, training, and experience that would be relevant to a client's decision to retain her services. This specifically includes the right, and, in certain circumstances the obligation, to advise potential clients of any technical and professional licensure or educational achievement she has obtained beyond her legal training and licensure. Under The Florida Bar's attorney

advertising rules, disclosure of the CPA and CFP credentials are permitted and are not misleading, false, deceptive or unfair under the circumstances presented. The Board of Accountancy's finding that Ibanez has violated the Board's advertising rules by disclosing in her attorney advertising that she is a CPA and a CFP is contrary to these principles and should be overturned.

Finally, the Board's decision violates those principles of the First Amendment that not only protect truthful commercial speech but also promote the dissemination of relevant, truthful information in furtherance of the public's economic and personal interests. In addition, the Board's suggestion that whenever lawyer-CPAs disclose information regarding their CPA licensure to the public it subjects each attorney's law firm to the rules regulating the practice of accounting firms is flawed. Although not specifically enforced in the Board's order, this concept has the potential to seriously affect the ability of lawyers to practice their trade without interference from the legislative and executive branches in Florida.

ARGUMENT

A. THE BOARD OF ACCOUNTANCY'S DECISION CONFLICTS WITH RULES OF THE FLORIDA BAR RELATED TO A LAWYER'S DISCLOSURE OF RELEVANT BIOGRAPHICAL INFORMATION AND THE ADVERTISING OF LEGAL SERVICES

1. Lawyers Provide More Than Technical Legal Advice

Chapter 4 of the Rules Regulating the Florida Bar encompass the Rules of Professional Conduct for its

members. The Rules explicitly recognize that lawyers perform broad functions for their clients as advisors, advocates, negotiators, intermediaries, and evaluators. The preamble to this Chapter states:

> A lawyer is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.
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> As a representative of clients, a lawyer performs various functions. As an advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As an advocate, a lawyer zealously asserts the client's position under the rules of the advocacy system. As a negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As an intermediary between clients, a lawyer seeks to reconcile their interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as an evaluator by examining a client's legal affairs and reporting about them to the client or to others.
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> Lawyers are officers of the court and they are responsible to the judiciary for the propriety of their professional activities. Within that context, the legal profession has been granted powers of self-government. Self-regulation helps maintain the legal profession's independence from undue government domination. *An independent legal profession is an important force in preserving government under law, for abuse to legal authority is more readily challenged by a profession whose members are not dependent on the executive and legislative branches of government for the right to practice. Supervision by an independent judiciary, and conformity with the rules the judiciary adopts*

for the profession, assures both independence and responsibility.

(Emphasis added) Chapter 4, Preamble, The Florida Bar, Rules of Professional Conduct. As these comments reveal, The Florida Bar is committed to an independent judiciary and legal profession and, therefore, opposes legislative or executive actions that impinge on that independence. The Board's order below is such an action.[2]

Under Rule 4-2, relating to a lawyer's role as counselor, Rule 4-2.1 entitled "Adviser" states:

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, *a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.*

Rule 4-2.1, The Florida Bar, Rules of Professional Conduct (emphasis added).

The comments to this Rule, which address the scope of a lawyers advice, further state:

> A client is entitled to straightforward advise expressing the lawyer's honest assessment. . . .
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> Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. . . .
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> A client may expressly or impliedly ask the lawyer for purely technical advice. . . . When such a request is made by a client inexperienced

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[2] The Florida Bar also officially opposes any amendments to the Florida Constitution which would alter the authority of the Supreme Court of Florida to regulate the admission of persons to the practice of law or discipline those persons admitted.

in legal matters, however, the lawyer's responsibility as adviser may include indicating that more may be involved than strictly legal considerations.

Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology, or social work: *business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.*

Rule 4-2, Comments, The Florida Bar, Rules of Professional Conduct (emphasis added).

Based upon these principles, which are applicable to all members of The Florida Bar, it is clear that a competent lawyer is more than just an advocate for a client hired to render technical legal advice, a lawyer is also an adviser, an evaluator, and a consultant. In order to perform these functions, lawyers are required to utilize the full range of their skills and knowledge on relevant topics, and not limit themselves to purely technical legal advice. Accordingly, lawyers who hold dual licensure as both attorneys and CPAs (or any other licensed professionals) must be able to provide their clients, within their recognized law practices, complete services of the nature and quality recognized as appropriate by The Florida Bar.

Within its Final Order, The Board of Accountancy has correctly recognized that with the exception of the "attest" function, defined as the independent opining of the truth and accuracy of financial statements, "all other activities of certified public accountants are activities

which are not prohibited to any non-CPA in the State of Florida." Ibanez did not provide any attestation services in conjunction with her law practice. The Board's finding that certain services she did provide were similar to those provided at the accounting firms where she worked before becoming a lawyer is irrelevant in this proceeding. By the Board's own admission, those services can be performed by non-CPAs, including attorneys. Furthermore, the record reflects Ibanez advised potential clients that she does not provide accounting services, but rather is a lawyer-CPA providing legal services. The fact that she possesses an active CPA license and discloses this fact in her attorney yellow page advertising and business cards, suggests nothing more than educational achievement and professional recognition in another field. This training, knowledge and experience is extremely relevant to the areas of law in which she has chosen to practice.

The Board's speculation that the public will be misled by the CPA designation because Ibanez does not license her firm as a CPA firm or limit the ownership of her firm to other CPAs is simply unsupported by the record and an unwarranted interference with the power of Florida's judiciary to regulate lawyers and with the free speech rights of lawyers to truthfully disclose their verifiable credentials and accomplishments in the advancement of their practices.[3]

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[3] Although this Brief will only generally address the issue of the application of the Board's Rules to a law firm, it is important to note that the Rules referred to in the Board's Order regarding contingency fee prohibitions and other firm organizational matters are contrary to those practices allowed by the Supreme Court of Florida. The Rules also improperly inject the Board, an executive body established by the legislative branch, into the regulation and control of persons traditionally subject solely to judicial oversight. This raises serious separation of powers issue that are outside the scope of this Brief but which will arise in the future should the Board threaten action against

2. The Florida Bar's Rules Regarding Advertising Permit Disclosure of Relevant Professional Licensure

The Florida Bar's lawyer advertising rules permit lawyers to discuss their CPA and CFP credentials in print advertising and business cards. A lawyer's responsibilities regarding information about legal services and advertising of those services to the public are set forth in Rule 4.7. As stated in Rule 4-7.1:

> A lawyer shall not make or permit to be made a false, misleading, deceptive, or unfair communication about the lawyer or the lawyer's services. A communication violates this rule if it:
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> (a) contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading;
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> (b) is likely to create an unjustified expectation about the results the lawyer can achieve or states or implies that the lawyer can achieve results by means that violate the Rules of Professional conduct or other law;

Rule 4-7.1, The Florida Bar, Rules of Professional Conduct. This Rule is similar to the Board of Accountancy rule under which Ibanez was disciplined. Rule 61H1-24.001, Fla. Admin. Code (formerly Rule 21A-24.001, Fla. Admin. Code)[4]. Nevertheless, the Board

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law firms whose members are dual licensed and who append the CPA designation in any publicly disseminated information.

[4] The Board ruled that Ibanez violated its rule prohibiting false or misleading advertising, Rule 61H1-24.001(2), which defines "advertising", including disclosures in business cards and letterheads, to be dissemination to the public of any statements "with the intent of furthering the purpose, either directly or indirectly, of *selling public accounting services, or offering to*

does not apply its Rule in a manner similar to The Florida Bar which specifically allows Ibanez to disclose her CPA and CFP credentials. Indeed, the Bar's Rules contemplate that Ibanez must provide this information to prospective clients (if relevant). As stated in Rule 4-7.3(a):

> (a) Information Regarding Qualifications. Each lawyer or law firm that advertises the lawyer's or law firm's availability to provide legal services shall have available in written form for delivery to any potential client:
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> (1) *a factual statement detailing the background, training, and experience of each lawyer or the law firm;*
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> (2) if the lawyer or law firm claims special expertise in the representation of clients in special matters or publicly limits the lawyer's or law firm's practice to special types of cases or clients, written information setting forth the *factual details of the lawyers experience, expertise, background, and training in such matters.*

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perform public accounting services, or inducing members of the public to enter into any obligation relating to such public accounting services." Id. (emphasis added). Although rejected by the Board, the evidence before the hearing officer was that Ibanez was diligent in advising potential clients that she was performing legal services and not accounting services. It is only through the application of the now invalid "holding out" rule, which the Board concedes was promulgated to address the judicial concerns raised regarding the overbreadth of the statutory definition of the practice of public accounting, that the Board exercised jurisdiction. Even assuming that the interplay of the statute and rules allows the Board to enforce an advertising ban on what it technically considers to be accounting services, which itself is doubtful, this regulatory presumption is unsupported by the facts and raises serious constitutional concerns regarding the application of the Board's Rules to the dissemination of relevant and truthful information regarding lawyers.

Rule 4-7.3(a), The Florida Bar, Rules of Professional Conduct. (Emphasis added). Rule 4-7.3(b), provides that the information noted above *must* be enclosed within any written communication that advertises a lawyer's services. Subsection (c) of the Rule provides that whenever a potential client requests "information regarding a lawyer or law firm for the purpose of making a decision regarding the employment of the lawyer or law firm," the lawyer or law firm shall promptly supply the information required above. In addition, the lawyer or law firm:

> may furnish such additional factual information regarding the lawyer or law firm deemed valuable to assist the client.

Rule 4-7.3(c)(2), The Florida Bar, Rules of Professional Conduct. Furthermore, subsection (f) of this Rule states that:

> Any factual statement contained in any advertisement or written communication or any information furnished to a prospective client under this rule shall not:
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> (1) be directly or impliedly false or misleading;
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> (2) be potentially false or misleading;
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> (3) fail to disclose material information necessary to prevent the information supplied from being actually or potentially false or misleading;
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> (4) be unsubstantiated in fact; or
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> (5) be unfair or deceptive.

Rule 4-7.3(f), The Florida Bar, Rules of Professional Conduct.

As these Rules reveal, the Florida Bar has an interest similar to the Board of Accountancy in protecting the public from deceptive advertising. The Florida Bar believes, however, that clients and prospective clients are entitled to full disclosure of relevant factual information regarding a lawyer, including factual details of a lawyer's experience, expertise, background and training. As the comments to the foregoing Rule state:

> Consumers and potential clients have a right to receive factual, objective information from lawyers who are advertising their availability to handle legal matters. The rule provides that potential clients may request such information and be given the opportunity to review that information without being required to come to a lawyer's office to obtain it. *Selection of appropriate counsel is based upon a number of factors. However, selection can be enhanced by potential clients having factual information at their disposal for review and comparison.*

Rule 4-7.3, Comments, The Florida Bar, Rules of Professional Conduct (emphasis added).

The Florida Bar's position is that because the prospective client makes the ultimate decision on hiring and retaining a lawyer, it is important to give the prospective client relevant factual information about each lawyer in order for the client to make an informed choice.[5] Although the Bar, like the Board, is concerned with even the potential to mislead the public, that concern does not

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[5] Under the Board of Accountancy's Rules, a *"client"* is defined as a person or entity "which *retains a licensee for the performance of accounting services.*" Rule 61H1-20.003, Fla. Admin. Code. (Emphasis added). This last phrase is not defined in the accounting statutes or Rules. It is only by virtue of the use of the designation "CPA" that the Board even suggests that Ibanez "technically" provided accounting services and is engaged in the practice of public accounting. The record reveals that no "clients" of Ibanez retained her to perform accounting services. To the contrary, they retained her to provide legal services. Indeed, it is illogical to suggest that the public is misled about the services Ibanez offers to provide when she does not advertise in the "accountants" section of the yellow pages but instead was disciplined for her advertisement in the "attorneys" section of the yellow pages. The implicit assumption that a prospective client seeking accounting services would look in the lawyer section of the yellow pages is not well-founded.

require a total prohibition on the truthful disclosure of multiple licensure. Although most advertisements of lawyers are subject to prior filing, evaluation, and approval under Bar Rule 4-7.5, the Rule also provides that:

> Any advertisement in any of the public media, *including the yellow pages of telephone directories,* that contain no illustrations and no information other than set forth in rule 4-7.2(n)(1)-(8) [is exempt from filing and approval requirements.]

Rule 4-7.5, The Florida Bar, Rules of Professional Conduct. (Emphasis added). Subsections(n)(1)-(9) of Rule 4-7.2 define the permissible contents of advertising, which if included in advertisements and written communication, are presumed *not* to be false, misleading, deceptive or unfair communication under Rule 4-7.1, The Florida Bar, Rules of Professional Conduct. This Rule specifically includes disclosure of:

> technical and professional licenses granted by the state or other recognized licensing authorities and educational degrees received, including dates and institutions.

Rule 4.-7.2(n)(3), The Florida Bar, Rules of Professional Conduct. Thus, The Florida Bar's Rules specifically permit Ibanez to disclose her CPA and CFP licensure and certifications. As discussed above, in certain circumstances, this type of biographical information must be disclosed when requested by a client or prospective client.[6]

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[6] Under the prior Code of Professional Responsibility, specifically, DR 2-102, lawyers with other professional licensure must conduct their practices from offices that were functionally and geographically separate, and could not disclose additional registration or licensure on their letterhead, business cards or office doors. As of July 1979, however, this provision was deleted. Thus, under the old Code, and the current Rules of Professional Conduct, which are patterned after the ABA model Rules of Professional Conduct, this type of dual practice and disclosure of the dual practice is no longer prohibited. *See* Op.

B. PUBLIC POLICY CONSIDERATIONS FAVOR IBANEZ' FIRST AMENDMENT COMMERCIAL SPEECH RIGHTS

The Florida Bar supports Ibanez' arguments that this Court's contemporary commercial speech precedents sustain her right to publicly display her professional credentials. The Bar will not reiterate the constitutional principles of *Bates* and its progeny that the favor disclosure of truthful, verifiable information. The Bar, however, presents two public policy considerations that lend further support for Ibanez' position that she has a commercial speech right to list her CPA and CFP credentials in her attorney advertising and on her business card.

1. The Economic Value of Truthful and Verifiable Information About Professional Credentials

The contemporary commercial speech doctrine reflects a policy in favor of accurate information in a consumer-oriented society.[7] Consumers, businesses, and governmental decision-makers (including the judiciary) all increasingly demand the prompt provision of relevant information in their daily operations. The primary goals of information are to facilitate decision-making and to channel resources into their most productive uses.[8] Information forms the basis for not only personal and business

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79-3, Professional Ethics of the Florida Bar; *see also*, Op. 88-9 Professional Ethics of the Florida Bar. Moreover, the Board of Accountancy continues to have this type of prohibition on the structure of a CPA's practice within its Rules. Rule 61H1-26, Fla. Admin. Code.

[7] Terry Calvani, James Langenfeld, & Gordon Shuford, *Attorney Advertising and Competition at the Bar*, 41 *Vand. L. Rev.* 761, 774-78 (1988); Scott D. Makar, *Advertising Legal Services: The Case for Quality and Self-Laudatory Claims*, 37 *U. Fla. L. Rev.* 969, 982-991 (1985) (discussion of *Bates* and its progeny).

[8] Makar, *supra* note 7, at 991; Ronald Coase, *Advertising and Free Speech*, 6 *J. Legal Stud.* 1 (1977).

decisions but also enables the differentiation of professional services and relationships. For these reasons, public policy favors the disclosure of truthful, relevant and verifiable information.[9]

In this regard, consumers of legal (and non-legal) services are increasingly more sophisticated and have a greater understanding of the inherent limitations of advertising (e.g. limited information due to time and space restrictions). In seeking legal services, consumers search for indicia, such as professional credentials, that differentiate between providers of professional services, and provide a better description of lawyers' capabilities.[10] The ability to convey one's professional credentials is also important in service industries because of the personal nature of the relationship with the consumer.

For instance, Ibanez' inclusion of the CPA designation in her telephone listing in the "Attorney" section of the Yellow Pages does not appear to be for the purpose of holding herself out as a practicing CPA who provides accounting services to the public. Instead, the CPA credential provides truthful information to consumers of legal services that Ibanez has a professional background in public accounting. The value of the CPA credential to consumers of legal services is that it signifies the attorney has also met the training and continuing education requirements for obtaining and maintaining the CPA

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[9] *See* George Stigler, *The Economics of Information*, 69 *J. Pol. Econ.* 213 (1961) (advertising tends to lower prices and stimulate competition); *Peel v. Attorney Reg. & Disciplinary Com'n*, ___ U.S. ___, 110 S. Ct. 2281, 2292 (1990) ("disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is a concealment of such information.").

[10] *See generally* Nelson, *Information and Consumer Behavior*, 78 *J. Pol. Econ.* 311 (1970) (consumers search for information on products and services in many ways such as acquiring information through direct product/service utilization, reputation, or advertising).

license. This information is valuable particularly to consumers seeking to hire an attorney for a business, estate, or financial problem. These consumers may prefer an attorney who understands complex concepts and subjects in which CPAs must demonstrate competence to keep their licenses active such as present value, accounting practices, depreciation policy, ledger maintenance, cash flow analysis, income statements and balance sheets, capitalization review, and leverage theory. Use of the brief CPA designation conveys a significant amount of information about the accounting background and abilities of the attorney who has attained the credential. The credential provides this information with low search costs to consumers who wish to avoid contacting each prospective attorney to obtain this information.[11]

An indicator of the economic value of professional credentials is reflected in attorney listings in publications and databases such as Martindale-Hubbell and West's Legal Directory. Attorney listings in these publications routinely contain non-legal professional credentials and licensure in non-legal professions. For example, the listing of Florida attorneys in Martindale-Hubbell contains approximately 382 attorneys who indicate they are current or past holders of a CPA license or are affiliated with a CPA-related organization.[12] Similarly, the listing of Florida attorneys in the West Legal Directory contains approximately thirty-six attorneys who are current or past holders of a CPA license or are affiliated with a CPA-

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[11] Nelson, *Advertising as Information*, 82 *J. Pol. Econ.* 729, 729-31 (1974).

[12] Lexis, Martindale-Hubbell Library, FLDIR file, February 22, 1994 (search ("CPA" or "C.P.A." "certified public account!")). This search also found 310 attorneys under the "professional biography" listings for law firms. These attorneys, however, are probably duplicative of the individual attorney listings in large part.

related organization.[13] Notably, the West database has a specific entry where attorneys can list areas in which they are "Certified." Although the actual percentage of all attorney-CPAs who disclose their CPA credential in these publications is unknown,[14] the absolute numbers reflect that the credential or affiliation is an important piece of information to consumers and potential consumers of their legal services.

Unreasonable advertising restrictions can potentially reduce the availability of relevant information that consumers desire. For this reason, broad prohibitions on categories of relevant, truthful information, such as the Board of Accountancy's ban on attorneys' use of the CPA and CFP credentials, can have adverse economic effects. Without access to information on an attorney's non-legal credentials, consumers incur the risk of selecting an attorney without such important attributes. The Board of Accountancy's broad prohibition also may cause consumers seeking attorneys with non-legal credentials to turn to more costly and inefficient media of communication such as direct personal contacts and word-of-mouth. In contrast, a rule permitting disclosure of truthful, verifiable credentials allows the dissemination of relevant

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[13] West Legal Directory, Florida database, February 2, 1994 (search (CPA C.P.A. "certified public account!")).

[14] The Board of Accountancy's prohibition may have a chilling effect that caused some attorneys not to list their CPA or CFP credentials. For this reason, some attorneys may indirectly infer they are CPAs by listing membership in an association of CPAs but not specifically listing their CPA credential. In addition, the Martindale-Hubbell and West Legal Directory databases both provide attorneys with the choice of abbreviated or full listings (the latter being more expensive). Many attorneys choose the abbreviated listings due to cost considerations. Because the abbreviated listings do not list CPA or other certifications, attorney-CPAs who are listed there were not identified in the searches.

information that consumers would otherwise have difficulty obtaining individually.[15]

For these reasons, although the Board of Accountancy has a significant interest in regulating false, misleading or deceptive advertising, it cannot justify a total ban on all uses of the CPA and CFP designations that are truthful and verifiable. For instance, the CPA designation has both a certification purpose and an informational purpose. The Board has a strong interest in ensuring that individuals who use the CPA designation have, in fact, met the educational and examination requirements to be a state-certified public accountant. The Board, however, has a much lesser interest in regulating individuals who, having met the certification requirements, wish to inform others of their CPA status.

2. The Board of Accountancy's Position That Lawyer-CPAS Who Display Their CPA Designation or Who Provide Accounting Services Other Than the Attest Function Must License Their Law Practices as CPA Firms is Flawed

The Board of Accountancy's position that lawyer-CPAs who display their CPA designation, or who provide accounting type services other than the attest function, must license their practices as CPA firms demonstrates the overbreadth of the Board's reach in this action. Neither Ibanez' commercial use of her CPA credential nor

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[15] *Edenfield v. Fane*, ___ U.S. ___, 113 S. Ct. 1792, 1798 (1993) (total ban on direct solicitation prevents "broad access to complete and accurate information that First Amendment coverage of commercial speech is designed to safeguard.") *See generally* Lori B. Andrews, *Lawyer Advertising and the First Amendment*, 1981 *Am. B. Found. Res. J.* 967 (attorney advertising restrictions can impede effective advertising and interfere with the provision of truthful information about the nature, availability and cost of legal services).

her provision of accounting services any non-CPA could provide forms a basis for subjecting her legal practice to licensure by the Board as a CPA firm.

First, there is only one professional function which must be provided solely by CPAs in Florida: the "attest" function.[16] As stated in the Board's Final Order, "with the exception of the attest function, all other actions of certified public accountants are activities which are not prohibited to any non-CPA in the State of Florida." The Board has a keen interest in ensuring that only CPAs perform this function and that it is performed with independence and integrity. Rule 61H1-21.011, Fla. Admin. Code. This is the only function of a CPA that is inconsistent with the lawyer's role as an advocate.

Based on the record, neither Ibanez nor her law firm perform the attest function. Nonetheless, the Board of Accountancy places great weight on the fact Ibanez provides substantially the same services to the public in her law firm that she provided while she worked as a CPA for the accountancy firms of Coopers and Lybrand and Main Hurdman. The Board lists these services as:

> All types of tax services; including preparing tax opinions; representing clients before the IRS; evaluating the tax consequences of specific transactions and providing her clients with financial counseling and planning.

Conspicuously absent from the list of services is the attest function – the one function by the Board's own definition must only be performed by licensed CPAs.

Tax practice is a specific example of professional overlap and demonstrates the overbreadth of the Board

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[16] The attest function is defined as the independent opining on the truth and accuracy of financial statements, and is a function which is specifically permitted to be performed only by certified public accountants. Section 473.322(1)(c), Fla. Stat. (1993).

of Accountancy's regulatory efforts.[17] Tax law, which is based on Federal and state legislation, regulation, and

[17] Under Rule 61H1-21.002, Fla. Admin. Code, the standards regarding a CPA's objectivity and independence are relaxed. As stated: "In tax practice a licensee may resolve doubt in favor of his client as long as there is reasonable support for his position." Thus, in a tax practice a CPA can become an "advocate" for the client's position if supported by a reasonable interpretation of relevant tax laws and regulations. In addition, under the rules relating to continuing education requirements for CPAs, Rule 61H1-33 Fla. Admin. Code, courses qualifying for credit consist of separate categories for accounting and auditing subjects, which include financial accounting and accounting for specialized industries, general auditing theory and practice, auditing for specialized industries and audit applications to computers and information systems. In addition to the accounting and auditing credits, there are classifications for taxation and general business credits and behavioral subjects. These other categories consist of taxation; management services and management advisory services; oral and written communication; general business, which includes "economics, the social environment of business, *business law*, marketing, finance, quantitive applications of business and business policy and computers and information systems (without audit application); and administration of public accounting practice, including behavioral science, managerial effectiveness and management by objectives." Rule 61H1-33.003, Fla. Admin. Code. In addition, with respect to the attest function, there are generally accepted auditing standards, standards for accounting and review services; generally accepted accounting principles, and standards for governmental auditing. However, there are separate standards for prospective financial statements, standards for management advisory services, standards for tax practice, as well as standards for attorneys providing litigation support services. These non-auditing standards do not express the same concern for objectivity and independence and are not nearly as strict upon the practice of CPAs as the accounting and auditing standards. *See generally* Rule 61H1-20, Fla. Admin. Code. Thus, even under the Board of Accountancy's own standards, the

common law, is a complex and interdisciplinary web of legal and accounting concepts. For instance, an entire section of the Internal Revenue Code, Subchapter E, Sections 441 through 444 is entitled "Accounting Periods and Methods of Accounting." Providing advice on and interpretation of this Subchapter is as much, if not more, the province of tax attorneys rather than CPAs. As such, the specified list of tax services performed by Ibanez as a CPA for Coopers and Lybrand and Main Hurdman could arguably be better characterized as legal rather than accounting services. The Board of Accountancy's argument that the public needs the Board's protection from law firms practicing their own stock in trade reveals the flaw in the Board's efforts to censure one of its licensees for simply disclosing to the public the fact of her dual licensure.

In sum, law firms in Florida are not subject to licensure by the Florida Board of Accountancy. Rather, law firms are subject to regulation by The Florida Bar. Florida law firms and lawyers cannot perform the attest function, only CPA firms and CPAs can. It is common for law firms to engage in tax law practices, which under the complexities of the Internal Revenue Code involve knowledge and use of accounting skills. However, other than the attest function, all other functions of a CPA can be performed by a non-CPA. Although individual CPAs must be licensed by the Board of Accountancy, the Florida Legislature did not intend for law firms to be licensed as accounting firms when they engage in those activities which can be performed by non-CPAs.

CONCLUSION

The decision of the Board of Accountancy to discipline Ibanez for truthfully revealing her relevant professional credentials is contrary to the policy of The Florida

concerns expressed by the Board in disciplining Ibanez simply do not exist outside the context of the attest function.

Bar and violates Ibanez' commercial speech rights. For these reasons and those expressed above this Court should quash the decision of the District Court of Appeal of Florida, First District, with instructions to vacate the Board's ruling.

Respectfully submitted,

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February 28, 1994

(12)

FILED
MAR 31 1994
OFFICE OF THE CLERK

No. 93-639

In the Supreme Court of the United States October Term 1993

SILVIA S. IBANEZ,

Petitioner,

v.

STATE OF FLORIDA
DEPARTMENT OF PROFESSIONAL REGULATION,
BOARD OF ACCOUNTANCY

Respondent.

On Writ of Certiorari
To The District Court of Appeal of Florida
For the First District

BRIEF OF AMICUS CURIAE FLORIDA INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, in Support of Respondent

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QUESTIONS PRESENTED FOR REVIEW

Whether the State of Florida's statutory scheme violates the First Amendment by prohibiting an employee of a firm that is not licensed as a public accounting firm from holding herself out to the public as a certified public accountant (CPA) when providing accounting and tax services to the public.

Whether the State of Florida's regulatory scheme violates the First Amendment by prohibiting certified public accountants (CPAs) who are practicing public accounting from using the term "certified" in connection with self-designations and titles not approved by the Florida Board of Accountancy.

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On Writ of Certiorari
To The District Court of Appeal of Florida
For the First District

CONSENT OF THE PARTIES

Sylvia S. Ibanez, Petitioner, and State of Florida Department of Professional Regulation, Board of Accountancy, Respondent, have consented to the Florida Institute of Certified Public Accountants participating in these proceedings as Amicus Curiae in support of Respondent. Their consents have been filed with this Court.

INTEREST OF AMICUS CURIAE

The Florida Institute of Certified Public Accountants ("FICPA") is a Florida not-for-profit corporation with its principal place of business in Tallahassee, Florida. Founded in 1905, FICPA is an active professional organization of approximately 18,000 Certified Public Accountants ("CPAs"), working to improve the accounting profession and to serve the public. The FICPA is the fifth-largest state CPA organization in the United States. Its membership is comprised of practitioners in public accounting, industry, government, and education. Other membership categories include associate members, retired CPAs, and CPAs domiciled outside the State of Florida.

One of the primary purposes of the FICPA is to encourage the analysis, discussion, and understanding of issues related to the accounting profession. This includes monitoring the scope of services provided by CPAs in Florida and throughout the United States; monitoring legislation affecting the practice of public accountancy; assisting in the development of auditing, accounting, and ethical standards; and educating the public with regard to the responsibilities of CPAs. These areas of activity relate directly to the issues now before this Court.

FICPA has been granted consent to file a brief in this matter as Amicus Curiae in support of Respondent by counsels for Petitioner and Respondent.

SUMMARY OF ARGUMENT

This matter is before this Court as a result of the State of Florida Department of Professional Regulation, Board of Accountancy ("the Board") entering a Final Order that concluded that Petitioner violated subsections 473.323(1)(a), (f), (g), and (h), Florida Statutes, and Rule 21A-24.001, Florida Administrative Code. Petitioner appeals that Final Order which was affirmed per curiam by the Florida First District Court of Appeals, arguing that she has the constitutional right to practice public accounting as an employee of an unlicensed firm and to advertise her Certified Financial Planner ("CFP") status in conjunction with her Certified Public Accountant ("CPA") license.

Since 1931, the practice of public accountancy in Florida has been regulated pursuant to the State's police power. Under Florida's regulatory scheme, the practice of public accountancy is defined as a CPA providing services to the public involving the use of accounting skills or management advisory or consulting services while holding out to the public that the provider is a CPA. Except in areas not relevant to this case, the definition requires two separate elements: (a) the provision of accounting or management advisory or consulting services to the public, and (b) the holding out to the public that the provider of these services is a CPA.

In the proceedings below and before this Court, Petitioner admits both elements. Petitioner admits that, through her advertisements, she is holding out "to the world I am a CPA." She testified that her clients considered it "extremely valuable" she have an active CPA license and that she therefore considered it valuable for her to hold herself out to the public as a CPA.

Petitioner also admits that she is providing public accounting services by providing substantially the same services to the public in her current firm that she provided while working as a CPA for the national accounting firms Coopers & Lybrand and Main Hurdman. Petitioner testified that, as part of her current professional practice, she provides all types of tax services, including evaluating the tax consequences of specific transactions and providing her clients with financial counseling and planning services. All of these services involve the provision of accounting skills or management advisory or consulting services to the public and are substantially the same services she provided to the public when she worked for CPA firms.

As part of the licensure, educational, and technical requirements Florida imposes upon CPAs, CPAs are required to license their professional service corporations and partnerships with the Board. Fla. Stat. §§ 473.309, 473.3101 (1991). There is no dispute that the public accounting services Petitioner provides to the public are as an employee of an unlicensed firm, a violation of Chapter 473, Florida Statutes. As a result thereof, and by clear and convincing evidence, the Department of Professional Regulation (the "Department") established at the formal hearing that Petitioner violated subsections 473.323(1)(a), (f), (g), and (h), Florida Statutes, and Rule 21A-24.001, Florida Administrative Code.

Because the practice of public accounting involves holding oneself out to the public, the State of Florida chose to characterize this violation as a false and misleading advertisement. However, if Petitioner's employer had been licensed, it would not have been illegal for Petitioner to hold herself out to the public as a CPA. There are a number of law firms in Florida who are also licensed

as CPA firms and whose members hold themselves out to the public as CPAs. Contrary to Petitioner's repeated assertions, Florida does not ban lawyers from holding themselves out as CPAs. It only requires that their firms be licensed under Chapter 473.

Petitioner's arguments that Florida's law violates the First Amendment are without merit. The State has a substantial interest in ensuring that those professionals who hold themselves out to the public as CPAs while providing public accounting services are indeed subject to the State's educational, technical, and licensure requirements. The regulation is narrowly tailored to accomplish its purpose and is rationally related to that purpose.

With regard to advertising her Certified Financial Planner ("CFP") status, the Department also established by clear and convincing evidence that, while engaged in the practice of public accounting, Petitioner violated section 473.323 and Rule 21A-24.001 by appending her CFP designation after her name in advertisements.

In addition, since 1982, the Florida Board of Accountancy has consistently issued letter opinions that the designation "certified financial planner" is an accountancy specialization which has not been approved by the Board. Rule 21A-24.001 permits the use of certain specialist designations as long as the statement contains a disclaimer that the recognizing agency is not affiliated with the state or federal government and contains the agency's requirements for recognition, including any education, experience, and testing requirements. Here also, Florida has a substantial interest in ensuring that the public is not misled when a specialist designation is utilized and its regulation is rationally related and narrowly tailored to prevent confusion. However, with regard to such designation, Florida does prohibit the use of the term certified unless approved by the Board. The State also has a substantial interest in ensuring that the public is not confused by the use of certain designations including "certified" and that such designations do not convey the impression that the designations are licensed by the State. Florida's regulation is rationally related and narrowly tailored to this purpose.

For the foregoing reasons, the decision below should be affirmed.

ARGUMENT

I. THE STATE OF FLORIDA'S REGULATION OF THE PRACTICE OF PUBLIC ACCOUNTING DOES NOT VIOLATE THE FIRST AMENDMENT.

In its Final Order, the Department determined that Petitioner is engaged in the practice of public accountancy as an employee in an unlicensed entity and that by holding herself out to the public as a CPA, she violated section 473.323 and Rule 21A-24.001 by engaging in deceptive and misleading advertisement. (J.A. 178-95) By asserting that the disclosure of her CPA status is constitutionally protected commercial speech under the First Amendment, Petitioner seeks the constitutional right to solicit the public as a CPA, to provide the requested accounting services, and to then ignore the State of Florida's regulatory requirements that accompany being a CPA. Petitioner's appeal challenges not only Florida's definition of public accounting and its "holding out" requirement, but the regulatory structure of all states that utilize "Title Acts" to regulate services.

A. The State of Florida Defines the Practice of Public Accounting as Providing Services Involving the Use of Accounting or Management Advisory or Consulting Services to the Public While Holding Out to the Public That the Provider is a Certified Public Accountant.

Since 1931, Florida has regulated the practice of public accountancy pursuant to the State's police power. In Heller v. Abess, 184 So. 122, 127 (1938), the Florida Supreme Court held the profession of public accounting was sufficiently charged with public interest to justify legislation providing for the registration of accountants and prohibiting the practice of accountancy as a CPA in the State of Florida without certification by the State. In keeping with that public interest, Florida has enacted Chapter 473, Florida

Statutes, and Chapter 21A, Florida Administrative Code, in order to regulate the practice of public accountancy.[1] This regulatory scheme seeks to ensure the integrity, independence, and objectivity of CPAs in the provision of public accounting services.[2]5

This Court has previously recognized it is critical that, in performing accounting services, CPAs "'maintain total independence' and act with 'complete fidelity to the public trust.'" Edenfield v. Fane, 507 U.S. ____, 123 L. Ed. 2d 543, 554-55, 113 S. Ct. 1792 (1993), quoting United States v. Arthur Young & Co., 465 U.S. 805, cert. denied, 466 U.S. 936 (1984).

With the exception of the attest function, any individual may provide accounting services to the public.[3] (J.A. 180) As a result, Florida regulates public accounting through a "Title Act," whose purpose is to protect the public by assuring consumers that CPAs who hold themselves out as CPAs meet the technical, educational, and other standards imposed by the Florida Legislature and the Board of Accountancy. (J.A. at 180-85) See also Mercer v. Hemmings, 170 So. 2d 33 (Fla. 1964). Licensure Acts, by contrast, prohibit all but the licensed individuals from performing the regulated activities. See, e.g., Abramson v. Gonzalez, 949 F.2d 1567 (11th Cir. 1992).

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[1]Chapter 21A, Florida Administrative Code, has recently been recodified in Chapter 61H, Florida Administrative Code.

[2]The provisions include, for example, the technical standards set forth in section 473.315, Florida Statutes, and Rule 21A-22, Florida Administrative Code, the prohibitions on the use of commission and contingency fees set forth in sections 473.3205 and 473.31, Florida Statutes, and the disciplinary provisions of section 473.323 and Rule 21A-36.

[3]The attest function refers to the process by which a CPA audits financial statements prepared by an entity and expresses an opinion as to whether the entity's financial position and results of operation are fairly presented in accord with generally accepted accounting principles.

The statutory definition of the practice of public accountancy in Florida is:

> (a) Offering to perform or performing for the public one or more types of services involving the use of accounting skills, or one or more types of management advisory or consulting services, by a certified public accountant, or firm of certified public accounts, of this state, including the performance of such services in the employ of another person; or
>
> (b) Offering to perform or performing for the public one or more types of services involving the use of accounting skills, or one or more types of management advisory or consulting services, by any other person holding himself or itself out as a certified public accountant or a firm of certified public accountants, including the performance of such services by a certified public accountant in the employ of a person so holding himself or itself out . . . .

Fla. Stat. § 473.302(4)(a)(b) (1991). Except for the attest function and certain associations with financial statements that are not at issue in this case, the Florida Board of Accountancy has interpreted this definition to exempt from the practice of public accounting CPAs who do not hold themselves out as CPAs and CPAs who provide services only to their employer. See Rule 21A-20.011, Florida Administrative Code; Cenac v. Florida State Bd. of Acct., 399 So. 2d 1013 (Fla. 1st DCA 1981).

Therefore, to the extent that a CPA provides one or more types of accounting skills and management advisory or consulting services to the public, while holding out to the public as a CPA, such individual is practicing public accounting. (J.A. 183) Florida's definition requires two separate elements: (a) the provision of accounting or management advisory services to the public, and

(b) the holding out to the public as a CPA providing these services.[4] If only one element is present, the activity is not the practice of public accounting and is not subject to regulation by the State.

In Counts I and III of the Amended Administrative Complaint, the Department charged Petitioner with violating subsections 473.323(1)(a), (f), (g), and (h) and Rule 21A-24.001 by engaging in deceptive and misleading advertisements by rendering public accounting services in an unlicensed firm and by appending the CPA designation after her name in advertisements;[5] Count II charged Petitioner with violating subsections 473.323(1)(f) and Rule 21A-24.001 by providing public accounting services and by appending the CPA and CFP designation after her name in advertisements. (R. 032, 0103) At the hearing, the Department established by clear and convincing evidence that Petitioner is engaged in the practice of public accountancy in an unlicensed entity and that by holding herself out to the public as a CPA when providing these services, she violated section 473.323 and Rule 21A-24.001 by engaging in deceptive and misleading advertising.

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[4]"Holding out" has been defined as engaging in advertising or a course of conduct to inform the public. See, e.g., Evans v. Hoyme, 105 N.W.2d 71, 75 (S.D. 1960); Cenac v. Florida State Bd. of Acct., 399 So. 2d 1013, 1015 (Fla. 1st DCA 1981).

[5]Count I charged Petitioner with violating section 473.309, Florida Statutes, which prohibits the practice of public accounting in an unlicensed firm. (R. 032) However, because that charge was added late in the process, it was stricken on procedural grounds. However, the factual allegation of practicing in an unlicensed firm remained in paragraphs 8 and 9 of the complaint. The effect was to charge Petitioner in Counts I and III with violating subsections 473.323(1)(a), (f), (g), and (h) by deceptively practicing public accounting in an unlicensed firm by appending the CPA designation after her name in advertisements. See (J.A. 185, n.7) Although the underlying charge of practicing in a firm without a license was stricken, Petitioner admits to not having licensed her firm pursuant to this provision and the Board so found. Petitioner's Initial Brief at 21, 28.

B. The State of Florida Properly Sanctioned Petitioner for Rendering Public Accounting Services Through an Unlicensed Firm.

Petitioner asserts that she has "left the practice of public accounting" and "currently engages in the practice of law, as a sole practitioner and provides legal services for her clients not provided by CPAs." Petitioner's Initial Brief at 3, 4. Petitioner also admits, however, that she, "is, in fact, a licensee subject to the rules of the Board of Accountancy. . . . Like every licensed CPA in Florida, [Petitioner] is obviously regulated by the Board." Id. at 28, 18. The Department submitted clear and convincing evidence that as a licensee Petitioner is engaged in deceptive and misleading advertising in the practice of public accounting by: (a) providing one or more types of accounting or management advisory services to the public, (b) holding out to the public that she is a CPA, and (c) rendering such services as an employee in an unlicensed firm in violation of Florida law.

As to the first element, Petitioner admits that she currently provides services that CPAs provide and that she provided these same services when she worked as a CPA at the accounting firms of Coopers & Lybrand and Main Hurdman. These services include representing clients before the Internal Revenue Service, providing tax opinions, evaluating the tax consequence of certain transactions, as well as providing financial and estate planning. Petitioner's Initial Brief at 4. These services require that she analyze financial statements and give opinions based thereon. (R. 0460) All of these services involve the provision of accounting skills or management advisory or consulting services to the public. Petitioner utilizes her accounting education and skills and provides services that she

performed while practicing as a CPA for CPA firms. (R. 0461, 0464-66, 1225).

The fact that the same services can be provided by lawyers and CPAs, or even unlicensed persons, does not mean that the services are not accounting services; rather, it means that the licensee, when holding herself out as being dually licensed to perform these services in both capacities, remains subject to the licensure and discipline of both regulatory authorities. (R. 0554, 0621, 0671) See, e.g., Goldberg, A Lawyer's Multiple Occupations, 6 Wake Forest Intramural L. Rev. 191, 197 (1970).[6] Dual licensure is a common occurrence in Florida with many practitioners operating under both licenses. (R. 0309-10, 0685) It simply requires that the licensee comply with the more restrictive licensure standard in those instances where the professions have different requirements. (R.0671)[7]

As to the second element, Petitioner also admits to holding herself out to the public as a CPA when providing public accounting services. When asked whether she was holding herself out to the

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[6]In its brief, Amicus Curiae The Florida Bar recognizes the possibility of dual licensure, but argues that Petitioner is advertising her status only for biographical reasons. Id. at 7, 8, 12 n.5. The Board's Final Order reached a contrary conclusion. (Recommended Order, J.A. 156; Final Order, J.A. 184)

[7]The Florida Bar states it is a violation of their rules for lawyers not to hold out to their clients they are CPAs. Unfortunately, the Florida Bar did not participate in the proceeding below so that their assertions could be examined. However, there appear to be hundreds, if not thousands, of Florida lawyers who are CPAs who do not engage in the practice of holding out to the public they are CPAs. Therefore, if the Bar is correct, it seems strange that there is not one reported case of the Bar having disciplined a lawyer for not informing their client they are a CPA. The record below does show, however, that many lawyers who hold themselves out to their clients as CPAs are properly licensed to do so. (R. 0685)

public as a CPA, Petitioner stated: "So, if you're asking me am I holding out as a CPA -- for identification purposes, yes, I identify to the world I am a CPA." (J.A. 68; see also R. 0180, 0426, 0649; Petitioner's Initial Brief at 10) Petitioner testified that her clients considered it "extremely valuable" that she have an active CPA license and that she believed it was valuable for her to hold herself out to the public as a CPA:

> It is a series of things. For example, when I do representational work before the IRS, most of the clients that come to me and want an attorney for representation before the IRS they find that the fact that I hold a CPA license and worked for many years as a public accountant makes me--endows me with the ability to really understand the tax returns and defend the legal principles and advocate my client's position. So they feel that is an enhancement, that education baggage or those education marks that I have earned and worked so hard for.

(R. 0442-43; see also R. 0456, 0522)

Under the attorneys section in the yellow pages, Petitioner advertises her professional employment as "Ibanez, Sylvia S. CPA, CFP." (R. 1224) Under the white pages, Petitioner advertises her professional employment as "Ibanez, Sylvia S., CPA CFP ATTY." (R. 1224) In addition, Petitioner's business card states "Sylvia Safille Ibanez, J.D., CPA, CFP." (R. 1224) Although Petitioner disputes the efficacy of this advertisement, she admits that it would have an adverse impact on her practice if she were to stop advertising that she holds a CPA certificate. (R. 0456)

Petitioner and Amici Curiae argue that because she is not listed in the yellow pages under "public accountants" and because her law office only advertises the fact that she is a lawyer, this somehow negates her advertisements. The fallacy of this argument

is plain. The record shows that her advertisements were successful and that she has managed to convey to her clients and "the world" that she is a CPA. (R. 0456) The fact that Petitioner has chosen to refrain from advertising in one place while actively advertising in another does not diminish or remove the fact that she advertises to the public that she is a CPA. In the yellow pages listing under "attorneys," any member of the public seeking an attorney with public accounting skills would see her listing and believe that Petitioner is offering both legal and public accounting professional services.

Under no circumstances should Petitioner be permitted to advertise her availability to provide CPA services and then avoid the application and regulation of Chapter 473 by promising to disclaim otherwise. Such disclaimers in conjunction with advertising would constitute "bait and switch," be inherently misleading, and should be prohibited. Fla. Stat. § 473.323(g) (1993).

The Final Order found that potential clients "would clearly see respondent's use of the title 'CPA' in her advertisements as an inducement to contact Petitioner and seek her services thinking that she was a licensee subject to the rules of the Board of Accountancy." (J.A. at 189) The reason for this is obvious:

> The use of the term "CPA" implies a specific competency to the public. The fact that Ibanez is a CPA is valuable to her legal clients. CPA status is a valuable property right to each CPA, and the ability of the practicing attorney to publicize the fact that s/he holds an active CPA license is a valuable asset to that individual.

(Recommended Order, J.A. 153)

Petitioner's advertisements communicate to the public that she is currently licensed as a CPA and is in compliance with the related technical and educational requirements. (Final Order, J.A. 180) To every member of the public who sees these advertisements, she is holding herself out as being competent, in good standing, and subject to the requirements for such professionals in providing public accounting services. However, to the Board of Accountancy, she says she is not practicing public accounting and will not comply with the laws related thereto. (J.A. 70).

The Department also presented testimony from Dean Dennison, Chairman of the Board of Accountancy and an expert in public accounting:

> If the public that's out there being served identifies a service or received a service, advice, counsel, whatever, from a person who does hold themselves out as a CPA, I think they have a right to expect that they [the CPA] would be disciplined and subject to the chapters that govern any CPA that holds themselves out.
>
> If the individual totally disassociates himself, even though he may keep his credentials current, if he or she disassociates herself with the identification of a CPA and they are there doing those other business activities and the public has no reason to believe that they are in any way holding themselves out, then I think the public doesn't have the same expectation for that person who has not held themselves out as a CPA, therefore, they are not expecting any more competency than anybody else, no matter what their licensure may be.

(R. 0659-60)[8] The Department, therefore, established by clear and convincing evidence that Petitioner is engaged in the practice of public accounting by providing public accounting services while holding herself out to the public as a CPA. (J.A. 180)

As to the final element, licensure of her firm, Florida also requires, as part of its regulatory requirements, that CPAs license their professional service corporations and partnerships with the State. Fla. Stat. §§ 473.309, 473.3101 (1991). There is no dispute that Petitioner has not licensed her firm in accord with the above provisions. Petitioner's Initial Brief at 21, 28. Contrary to Petitioner's arguments, the Department is not "hypothesiz[ing] that . . . [Petitioner] may run afoul of the Board's rules," -- Petitioner has run afoul of the Board's rules. Petitioner's Initial Brief at 21. By engaging in the practice of public accounting, Petitioner is required to comply with all of Florida's licensure regulations, including licensing her firm pursuant to sections 473.309 and 473.3101, Florida Statutes.

Petitioner argues that, "there is no evidence in the record as to why she should license the law firm as a CPA firm," and that her failure to license her firm "has no bearing on the fact that Petitioner is entitled to advertise that" she is a CPA. Petitioner's Initial Brief at 18, 28. Because Petitioner trades upon the fact that she is a CPA, provides services that she admits are public accounting services, and profits as a result thereof, she is engaged in the practice of public accounting and must comply with Florida's laws

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[8]The Department also presented the testimony of Louis W. Dooner, an expert in public accounting, who similarly testified that by advertising her CPA status while providing accounting services, Petitioner was engaged in the practice of public accounting. (J.A. 17-27)

regarding licensure. "[T]here is no arbitrary deprivation of [the right to continue to pursue a lawful occupation] where its exercise is not permitted because of a failure to comply with conditions imposed by the state for the protection of society." Dent v. West Virginia, 129 U.S. 114, 122 (1889). Although she disagrees, those activities clearly bring her within Florida's definition of the practice of public accounting, and thus the requirement that she license her firm.

Accordingly, the Final Order entered by the Board correctly determined that Petitioner engaged in deceptive and misleading advertising in violation of subsections 473.323(1)(a), (f), (g), and (h), Florida Statutes, and Rule 21A-24.001, Florida Administrative Code, by holding out that she is a CPA and rendering public accounting services as an employee of an unlicensed firm. (J.A. 194) The First Amendment, for the reasons set forth below, does not shelter Petitioner's clear violation of Florida law.[9]

C. The State of Florida May Discipline Petitioner for Practicing Public Accounting in an Unlicensed Firm Without Violating the First Amendment.

In order to shoehorn her claim into a First Amendment claim, Petitioner argues that Florida's provisions constitute a total ban on the disclosure of truthful, biographical information as to her professional credentials, which disclosure is constitutionally protected commercial speech under the First Amendment.

[9]Petitioner also argues that her failure to license her firm is irrelevant, "considering that the Board did not charge Ibanez with practicing in an unlicensed CPA firm." Petitioner's Initial Brief at 32. Contrary to Petitioner's statement, Petitioner was charged with practicing in an unlicensed firm. Although dismissed for being filed too late in the proceedings, it still formed the underlying factual basis for the charge of deceptive and misleading advertisements by advertising her CPA status while practicing public accounting as an employee of an unlicensed firm.

Nothing could be further from the truth. Having been granted her CPA certificate, Petitioner is free to advertise and disclose that status so long as she complies with the requirements of Chapter 473. Before this Court, she apparently has no problem in complying with Chapter 473's requirements. See Petitioner's Initial Brief, at 28, 18. In the lower proceedings, however, Petitioner strenuously objected to complying with Florida's requirements, arguing that she is not engaged in activity that would bring her within Chapter 473, that she is not subject to Chapter 473, and that she would not comply with its provisions. "I'm not practicing public accounting. I'm practicing law. So, why should they try to use those standards or that rule to measure my activities in the practice of law? I don't see it." (J.A. 70; see also J.A. 80, 93, 106; R. 425, 448) For the reasons set forth above, Petitioner is engaged in the practice of public accounting and is subject to Chapter 473's provisions. The First Amendment protection for commercial speech does not include protecting Petitioner's right to advertise as a CPA when in fact she has not complied with the requirements for being a CPA.

This Court applies a four-part test for determining the constitutionality of governmental regulations of commercial speech. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).[10] In its Final Order, the Board applied that test

[10]That test requires first, that the speech at issue concern a lawful activity and not be misleading; second, that the restriction on commercial speech serve a substantial governmental interest; third, that the regulation directly advance the asserted governmental interest; and fourth, that the regulation be no more extensive than necessary to advance such interests. Central Hudson, 447 U.S. at 566.

to Petitioner's advertisements to find its regulation constitutional under the First Amendment.

There can be no doubt that Petitioner fails the first element of the test in that Petitioner is unlawfully practicing public accounting by practicing in an unlicensed firm. No First Amendment protection exists for unlawful or deceptive activities, including Petitioner's. "The First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flow[s] cleanly as well as freely." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771-72 (1976). The regulation prohibits deceptive conduct. Petitioner's refusal to register her firm while at the same time soliciting new accounting business as a CPA constitutes deceptive conduct. It is inherently misleading for Petitioner to advertise her status as a licensee, perform work associated with that license, and then refuse to be bound by the licensure and regulatory requirements for that license. The First Amendment does not prohibit states from restricting such deceptive conduct.

Directly analogous are cases which have restricted non-CPAs from advertising their services as public accountants. In Accountant's Soc. of Va. v. Bowman, 860 F.2d 602 (4th Cir. 1988), the court stated:

> The state has an interest in assuring the public that only persons who have demonstrated their qualifications as certified public accountants and received a license can hold themselves out as certified public accountants . . . . We believe that use of the title "public accountant" by a non-CPA fairly could be characterized as inherently misleading, given the possibility, accurately stated by the district court, that "some members of the public would believe the title . . . has the state's imprimatur."

Id. at 605.

Courts have a similar conclusion for other professions. Recently, in Grandee v. Glaser, 785 F. Supp. 684 (S.D. Ohio 1992), the court found the use of the term "audiologist" by hearing aid fitters to be inherently misleading:

> [T]he court believes that the use of the term "audiologist" by a hearing aid dealer is likely to materially deceive or mislead consumers as to the dealer's educational level. Such deception is "material" in that it is likely that consumers would find the educational level of such an individual an important consideration, and one that would most likely affect a choice. . . .

Id. at 691.

To the extent that Petitioner is seeking to trade upon her CPA license to obtain professional employment while at the same time refusing to comply with Chapter 473 for the provision of those services, this case is no different from the legion of cases which have prevented non-licensed individuals from holding themselves out as being licensed. See, e.g., Florida Acct. Ass'n v. Dandelake, 98 So. 2d 323 (Fla. 1957); Florida Bar v. Brumbaugh, 355 So. 2d 1186 (Fla. 1978).

If Petitioner's activities are not found to be unlawful or inherently misleading, the second element requires that the State's interest be substantial. The State's interest in preventing a licensee from violating regulations imposed by the State and in preventing misleading advertisements is unquestionably substantial. "For purposes of that test, there is no question that Florida's interest in ensuring the accuracy of commercial information in the marketplace is substantial." Edenfield v. Fane, 507 U.S. ___, 123 L. Ed. 2d

543, 554, 113 S. Ct. 1792 (1993). This Court has recognized that, if not inherently misleading, then it is clearly potentially misleading for a licensee to advertise that one is "certified," but yet not be subject to state regulation. See Peel v. Atty. Registration and Disciplinary Comm'n, 496 U.S. 91 (1990)(Marshall, J., concurring). The State's interest in preventing potentially misleading advertisements is substantial.

The third element requires that the regulation directly advance the governmental interest. This requires the State to "demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree." Edenfield, 123 L. Ed. 2d at 555. By requiring CPAs to be subject to the State's licensure and regulations, the State is acting in a direct and causal manner to further its interest of ensuring that those CPAs who hold themselves out as practicing public accountancy are indeed competent to do so. Indeed, holding oneself out as a professional not only represents that the individual has passed the necessary technical, educational and licensure requirements imposed by the state for a license for that particular profession, but also represents that the licensee is subject to the continued requirements for that license and sanctions for any violation. In fact, if Petitioner is not engaged in the practice of public accounting, the Board has no regulatory authority over her conduct or the quality of her work. Consumers who have their tax returns prepared by a CPA have a right to know that such regulatory authority is in place.

The fourth element, that there be a reasonable fit between the regulation and the state's interest, is met here. Florida simply requires those who hold themselves out as CPAs and who provide public accounting services remain subject to its licensure and regu-

lation. The regulation is directly tied to the State's interest in maintaining standards in the practice of accounting and is no more extensive than necessary. Contrary to Petitioner's argument, Florida's regulation does not constitute a total ban on her advertisements. The restriction is tailored narrowly so as to permit Petitioner to advertise her license, so long as she complies with Chapter 473. As such, Florida's regulation passes the fourth element. See Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989).

The State seeks to ensure responsible and truthful advertising. Petitioner freely admits that she seeks to append the CPA after her name because her status as a CPA is valuable to her clients and that her practice would suffer if she could not. It should be axiomatic that when she holds herself out in her current professional practice as a CPA performing services which constitute public accounting services, Petitioner necessarily holds herself out not only as a CPA, but also as a CPA licensed and regulated by the State in that capacity.

Petitioner and Amici Curiae, however, argue that this Court's decision in Peel grants her the right to advertise her certificate as truthful, biographical information. First, Florida does not prohibit the disclosure of CPA status where the intent is to provide biographical information. The record reflected that procedures have been established by the Board to permit the disclosure of that information. (R. 0236, 0624-25) Petitioner simply chose not to utilize those procedures. Florida's regulation, therefore, does not constitute a total ban and Peel's concerns about truthful, biographical information does not apply.

More importantly, Peel did not concern the right to advertise such information where the certificate holder is not in compliance

with the standards for holding the certificate and, in fact, refuses to comply. Contrary to Petitioner's and Amici Curiae's argument, a CPA certificate is not simply an "attainment"; rather, it is a professional license with concomitant responsibilities and regulations. "[T]he CPA mark is clearly meaningful and denotes State licensure status as a licensed CPA." Petitioner's Initial Brief at 28. In these circumstances, it would be misleading to permit the licensee to advertise when the licensee does not comply, and refuses to comply, with her regulatory responsibilities. Florida "has done no more than require that commercial information about [accounting services] 'appear in such a form . . . as [is] necessary to prevent its being deceptive.'" Friedman v. Rogers, 440 U.S. 1, 16 (1979) (citation omitted).

Petitioner also argues that the Florida Legislature has granted CPAs the absolute right to advertise their CPA status, asserting that the legend on her CPA certificate provides that the recipient, "has passed all examinations and has met all other requirements prescribed by law and by rule of this Board for certification as an expert public accountant and is therefore entitled to append the letters CPA after this registrant's name to evidence registration by this Board as a Certified Public Accountant." (R. 0088) Under no circumstances can the State's authorization for Petitioner to display her CPA license somehow operate to deprive the State of its continued licensure and regulation of Petitioner, including any advertisement of her CPA license. The CPA certificate is, of course, only evidence of a license and does not grant rights in and of itself. Petitioner errs in arguing that having been granted CPA status, the State thereafter lacks the ability to withdraw it or to regulate the manner in which it may be displayed.

For the foregoing reasons, the State's imposition of sanctions upon Petitioner for violating statutory provisions relating to licensure of professional service corporations is not a violation of the First Amendment.

D. The State of Florida May Regulate the Practice of Public Accounting by the Use of a Title Act.

Like most states, Florida regulates public accountancy through a "Title Act." Florida's definition of the practice of public accounting is the same as that set forth in the Uniform Accountancy Act. See American Institute of Certified Public Accountants & National Association of State Boards of Accountancy, Uniform Accountancy Act, Section 3(g), 1 C.C.H. Acct. L. Rptr. ¶ 1035. The American Institute of Certified Public Accountants has adopted a similar definition. See AICPA, Code of Professional Conduct, 1 C.C.H. Acct. L. Rptr. ¶ 1066.

In addition to Florida, a number of other states have adopted the Model Act's definition. See, e.g., Conn. Gen. Stat. Ann. § 20-279(b)(7) (West 1993); Haw. Rev. Stat. § 466-3 (1992); Idaho Code § 54-206(20) (Supp. 1993); Iowa Code § 542C.2 (Supp. 1993); Me. Rev. Stat. Ann. tit. 32, § 12201 (West 1993); Mass. Gen. L. Ann. Ch. 13 § 87A (Supp. 1993); Tex. Rev. Civ. Stat. Ann. art 41A-1.2(a)(6)(A) (West Supp. 1994); Utah Code Ann. § 58-26-2(12) (Supp. 1993); Vt. Stat. Ann. tit. 26, § 13(7) (Supp. 1993); Wash. Rev. Code Ann. § 18.04.025(5) (West 1994). Another six states have adopted the Model Act's definition of public accounting in their administrative regulations. See Ark. Reg. § 1.12; D.C. Reg. § 2599; Ga. Comp. R. & Regs. r. 20-2-.11 (1978); Md. Regs. Code tit. 9, § 24.01.01(6)(a) (Supp. 1993); Neb.

Admin. R. & Regs., tit. 288, Ch. 3.001(16) (1989); 49 Pa. Code § 11.1 (1993).

Fifteen more states have enacted statutory or administrative rule definitions of "the practice of public accounting" that also include the term "holding out" and are similar to the definition in the Model Act. See Rules and Regulations of the Mississippi State Board of Accounting, 1 C.C.H. Acct. L. Rpts. ¶ 26,105(m); Okla. Stat. tit. 59, § 15.1A(27) (1994); Ind. Code § 25-2-1-2(e) (1991); La. Rev. Stat. Ann. § 37:72(1) (West 1994); Mich. Comp. Laws Ann. § 339.702(1)(d) (West 1993); Minn. Stat. § 326.165(2) (West 1994); Mo. Code Regs. tit. 4, § 10-2.050(9)(A) (1993); Nev. Rev. Stat. Ann. § 628.023 (Michie 1986); N.H. Rev. Stat. Ann. § 309-A:1 (IV) (1992); N.M. Stat. Ann. § 61-28A-3.G & I (1993); N.Y. Educ. Law § 7401 (McKinney 1993); N.C. Gen. Stat. § 93-1(2)(5) (1993); Tenn. Code Ann. § 62-1-103(5) (1993); W. Va. Code § 30-9-2 (1993); Wis. Stat. Ann. § 442.02 (1988).

Enacted to protect the public safety and welfare, title acts and their requirements for licensure permit the state to provide additional competence in a field without completely occupying it. See, e.g., Gellhorn, Occupational Licensing--A Nationwide Delemma, J. Acct. 39, 42-43 (Jan. 1960); Moore, The Purpose of Licensing, 4 J.L. & Econ. 93, 104 (1961). Title acts are utilized for a wide variety of services, including, for example, psychology. See, e.g., Fischer, State Regulation of Psychologists, 58 Wash. U.L.Q. 639 (1980). All title acts, however, have as part of their regulation a "holding out" requirement so that those who want to take advantage of being a licensee can do so, subject to concomitant regulation, while at the same time permitting those who either do not meet the requirements or do not want to be subject to the regulation, to also

practice in that area so long as they do not "hold out" as possessing a license.

Petitioner and Amici Curiae argue that regulation by the Board is unnecessary because she is also subject to regulation by The Florida Bar. The Board's concerns, however, apply not just to lawyers, but to any individual who holds themselves out as a CPA and provides public accounting services. Florida's concerns apply whether the CPA is an attorney or a bookkeeper. Suppose, for example, a licensed CPA decides to limit their practice to the preparation of tax returns. No license is required to provide this service. Under Petitioner's argument, such a licensee could tell the public that I am a CPA, "a truthful fact," but tell the Board I am not practicing public accounting. Absent a holding out requirement, there is simply no workable definition of the practice of public accounting. When a licensee holds out to the public they are a CPA and provides public accounting serves, the Board seeks to assure consumers that the CPA is subject to regulation in providing public accounting services.

Petitioner's challenge threatens the very foundation of title acts and the states' ability to utilize them effectively. If this Court grants Petitioner the relief she seeks, the effect will be to eviscerate the states' ability to regulate through title acts. By assuring consumers that practitioners in a licensed field have met certain standards, the states have provided consumers with additional information as to the standard of care and conduct that will be provided. Permitting licensees to hold out that they are licensed but deny they are subject to regulation, will require the public to engage in additional research as to the standard of conduct and care that will be applicable. This will result in an increase in consumer

confusion, not a reduction. Because the distinction between such statuses would be confusing, permitting licensees to hold out would result in consumers receiving less protection. This Court should therefore affirm the decisions below.

II. THE STATE OF FLORIDA'S REGULATION OF THE USE OF THE TERM "CERTIFIED" DOES NOT VIOLATE THE FIRST AMENDMENT.

A. The State of Florida Properly Sanctioned Petitioner for Appending Her CFP Designation While Rendering Public Accounting Services.

Count II of the Amended Administrative Complaint alleged that Petitioner's use of the CPA and CFP designations after her name violated section 473.323(1)(f) and Rule 21A-24.001(i). The Department also submitted clear and convincing evidence in support of these allegations. The rule at issue prohibits the use by a CPA of designations which contain the terms "certified," "public," or "auditor" because the use of those terms in conjunction with CPA is confusing and deceptive as implying state licensure.

In 1991, Florida's Board of Public Accountancy adopted the current version of Rule 21A-24.001(j), which allows licensees to utilize certain designations with the disclosure of certain information. However, in order to avoid obvious confusion with state licensing requirements, the Board also adopted Rule 21A-24.001(i), which prohibits certified public accountants from using the use term "certified" in connection with designations it has not approved.

Under the clear terms of the prohibition, Petitioner's use and advertisement of her CFP status while engaging in the practice of public accounting violated Rule 21A-24.001(i) and the Department carried its burden of showing that Petitioner advertised her "CFP"

designation in violation of that Rule. (J.A. 36-40, 48) The First Amendment does not shelter Petitioner's intentional violation of Florida law.

B. The State of Florida's Regulation of the Use of the Term CFP When the Term is Used by CPAs Does Not Violate the First Amendment.

Under Central Hudson's test, it is inherently misleading to permit the use of designations which include the term "certified" in conjunction with the term "certified public accountant." When such terms are used in conjunction with each other, their use will create confusion in the minds of the public as to whether the other "certified" designation is licensed by the State. For that reason, the State may limit its use so as not to be misleading.

If the use of that term is not inherently misleading, then the second element requires that the State's interest be substantial before the State may prohibit the use of the term "certified." In Peel, Justice Marshall in his concurrence, noted that it would be potentially misleading for a state to permit a CPA to advertise his CPA license in conjunction with another designation that contained the term "certified," as the public might understand that as connoting governmental authorization or certification. 496 U.S. at 113. This is the State's concern and it establishes the State's substantial interest in regulating the use of the term "certified" in conjunction with the term CPA.

As to the third element, the prohibition directly advances the State's concerns. Because the terms CPA and CFP are similar when used in conjunction with each other, the State may regulate their use so as to limit the confusion that will be created in the minds of the public as to which designations are licensed by the

State. The regulation directly advances that interest by regulating its use.

With regard to the fourth element of Central Hudson, that the regulation be no more extensive than necessary, Florida's regulations are carefully tailored. Since 1982, the Board has consistently issued letter opinions that the designation "certified financial planner" is an accountancy specialization which has not been approved by the Board. (Recommended Order, J.A. 157) Except where prohibited by Rule 21A-24.00(1)(i), Rule 21A-24.001(1)(j) permits a licensee to disclose any formal recognition as long as "the statement contains a disclaimer stating that the recognizing agency is not affiliated with or sanctioned by the state or federal government . . . [and that it] contain the agency's requirements for recognition, including, but not limited to, education, experience and testing."[11] Petitioner errs in asserting that Florida's regulation does not permit the disclosure of information as required by Peel. See Rule 21A-24.001(j). This rule meets the requirements of Peel. Unfortunately, as with other requirements of Florida law, Petitioner made no attempt to comply with the provisions of the statute.

Petitioners rely heavily upon Peel, which struck Arizona's prohibition because the First Amendment allows the disclosure of truthful information where disclaimers are available to address the state's concerns. However, because the Board has found the use of the term "certified" to be confusing, it can only be used when approved by the Board. As the Final Order noted, "no request has ever been made for approval either by Respondent or by the parent organization which awarded her the certificate . . ." (J.A. 194)

[11]It should be noted that Petitioner has not challenged the constitutionality of this provision.

Florida's regulation, therefore, is narrowly tailored to its concerns and permits alternatives which Petitioner chose not to pursue.

CONCLUSION

For the foregoing reasons, the decision of the First District Court of Appeal of Florida should be affirmed.

Respectfully submitted,

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March 30, 1993

No. 93-639 (13)

Supreme Court, U.S.
MAR 31 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SILVIA S. IBANEZ,

Petitioner,

—v.—

STATE OF FLORIDA DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF ACCOUNTANCY,

Respondent.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA FOR THE FIRST DISTRICT

BRIEF OF THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Is the Florida Board of Accountancy's regulation of Petitioner's use of "CPA" after her name, when Petitioner refuses to comply with regulations applicable to those holding themselves out as CPAs, a constitutionally permissible exercise of the state's regulatory power?

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IN THE

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OCTOBER TERM, 1993

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SILVIA S. IBANEZ,

Petitioner,

—v.—

STATE OF FLORIDA
DEPARTMENT OF PROFESSIONAL REGULATION,
BOARD OF ACCOUNTANCY,

Respondent.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA FOR THE FIRST DISTRICT

BRIEF OF THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

PRELIMINARY STATEMENT

Pursuant to Rule 37.3 of the Rules of the Court, the American Institute of Certified Public Accountants (the "Institute") respectfully submits this brief as *amicus curiae* in support of the Respondent, State of Florida Department of Business and Professional Regulation, Board of Accountancy, with the written consent of the parties, filed herewith.

INTEREST OF THE INSTITUTE AS *AMICUS CURIAE*

The Institute is the national professional accounting organization, all of whose more than 312,000 members are certified public accountants ("CPAs"). The Institute's members provide accounting services to the public as sole practitioners and through firms and businesses of all sizes. The Institute's service to the public spans more than 100 years.

Among the Institute's purposes are the promotion and maintenance of high professional standards of practice. In pursuit of these ends, the Institute has been a principal force in developing accounting, auditing, and ethical standards that govern the provision of various types of services by CPAs.

This Court has recognized that public accounting is a highly skilled and technical profession, imbued with a distinctive public interest, and subject to substantial regulatory authority on the part of the states. Since 1896, when statutory recognition of CPAs was first adopted in New York, laws have been enacted in each state establishing state boards of accountancy, vested with the power and responsibility to examine, license, and regulate the practice of public accountancy. The Institute as well has promulgated ongoing regulatory requirements applicable to members who perform for a client accounting services and who hold themselves out as CPAs. One goal of this regulatory regime is to ensure that a member of the public, upon engaging the services of a CPA, can be confident that the CPA has satisfied, and continues to satisfy, regulatory requirements.

The Institute respectfully submits this brief in support of the Respondent's important authority to protect against the false and misleading use of "CPA" by those who do not adhere to this regulatory regime, and to ensure the integrity of the designation "CPA" as a hallmark distinguishing between

those accountants who accept such regulation and those who do not.

STATEMENT OF THE CASE

The practice of public accountancy in Florida has been regulated by the state for more than fifty years. Presently governed by chapter 473 of the Florida Statutes, it arose out of "a public need for independent and objective public accountants" and a state interest in protecting "the public from dishonest practitioners." Fla. Stat. ch. 473.301 (1991). Chapter 473 is administered by the Florida Department of Business and Professional Regulation, which encompasses the Board of Accountancy (the "Board"). *See* Fla. Stat. ch. 473.303-04 (Supp. 1994).

Among other things, chapter 473 provides for state licensing of CPAs. It provides that, to become a CPA in Florida, an individual must pass a rigorous examination, be of good moral character, and meet stringent educational requirements. Fla. Stat. ch. 473.306-08. The remainder of chapter 473 sets forth regulations governing the ongoing practice of state-licensed CPAs, including continuing education requirements, independence and technical standards, standards pertaining to advertising, other rules designed to assure objectivity (like restrictions on competitive bidding and acceptance of commissions), and disciplinary standards. *See, e.g.*, Fla. Stat. chs. 473.309-12, 473.315, 473.317, 473.319-24.

Chapter 473 applies to those persons who are engaged in the "practice of public accountancy." While individuals who are not CPAs may perform some accounting functions without being subject to the full panoply of state regulatory requirements, chapter 473 defines the "practice of public accountancy" in substance to involve two separate elements: (1) the performance of accounting services for the public (or offering to do so); and (2) holding oneself out as a certified pub-

lic accountant.[1] Fla. Stat. ch. 473.302(4). Where one both performs accounting services for the public, and holds oneself out as a certified public accountant, he or she is engaged in the "practice of public accountancy" and subject to state regulatory requirements.

Silvia Ibanez is such a person. A practicing attorney and a member of the Florida bar, she is also a Florida certified public accountant. She is the sole shareholder and employee of her firm, Silvia S. Ibanez, P.A., and advertises herself, on her business cards and in the telephone directory, as a "CPA." Though admittedly holding herself out as CPA, she has declined to comply with applicable state CPA regulations. At a minimum, she has refused to have her firm licensed by the

[1] The "practice of public accountancy" is defined by the State of Florida as:

> (a) Offering to perform or performing for the public one or more types of services involving the use of accounting skills, or one or more types of management advisory or consulting services, by a certified public account, or firm of certified public accountants, of this state, including the performance of such services in the employ of another person; or
>
> (b) Offering to perform or performing for the public one or more types of services involving the use of accounting skills, or one or more types of management advisory or consulting services, by any other person holding himself or itself out as a certified public accountant or a firm of certified public accountants, including the performance of such services by a certified public accountant in the employ of a person so holding himself or itself out. . . .

Fla. Stat. ch. 473.302(4) (presently 473.302(5) (Supp. 1994)). Excluded from the practice of public accountancy are: "(3) Activities of licensees who do not hold themselves out as certified public accountants." Fla. Admin. Code Ann. r. 21A-20.011 (presently 61H1-20.011 (1993)). Florida Administrative Code rule 21A-20.012 (presently 61H1-20.012 (1993)), which defines the term "holding out" contained in section 473.302(4), was declared invalid. *See Ibanez v. State Bd. of Accountancy*, DOAH Case No. 91-3336R, opinion rendered Jan. 15, 1992. The Board's Final Order in this case did not rely upon this rule, finding that Petitioner's conduct violated provisions of chapter 473 and other applicable rules.

state. The record is unclear as to the extent to which she is in noncompliance with other CPA regulations.

On June 13, 1991 (and as modified on August 22, 1991), the Department of Professional Regulation charged Ms. Ibanez with, *inter alia*, advertising in a false and deceptive manner while engaging in the practice of public accountancy, in violation of sections 473.323(1)(f), (g), and (h) of the Florida Statutes, and rule 21A-24.001 of the Florida Administrative Code. Petitioner argued that her ability to advertise as a CPA, notwithstanding her unwillingness to comply with applicable regulations, was protected by the First Amendment. Following a formal hearing, which included live testimony by witnesses on both sides, the Board found that Petitioner had committed a violation of the Florida Statutes. The Board found that Petitioner was engaged in the "practice of public accountancy" and that she was in noncompliance with the state's regulation of those engaged in the "practice of public accountancy" insofar as she had failed to have her firm licensed. Thus, the Board concluded, Petitioner's advertising of her CPA credential without complying with the provisions of chapter 473 was deceiving and misleading to the public. The Board rejected Petitioner's First Amendment argument, finding that the state's regulation of the "CPA" designation was a constitutionally permissible exercise of its power to regulate the practice of public accountancy. The Florida First District Court of Appeal affirmed.

SUMMARY OF ARGUMENT

While Petitioner's possession of a CPA certificate, by itself, is verifiable and true, her promotional use of the designation connotes and implies her compliance with Florida's regulatory regime governing CPAs. This use of the CPA designation while she simultaneously refuses to comply with applicable regulations is misleading. There is no validity in her claim that, as applied to her in these circumstances, Florida's pro-

hibition of this misleading use of the CPA credential violates the First Amendment.

This Court has consistently held that false and misleading commercial speech is not protected by the First Amendment. The Court has also recognized that otherwise verifiable commercial speech can be potentially misleading and thus subject to appropriate regulation. Such speech is at issue here. More, the potential for deception was, on this record, realized by Petitioner. In holding herself out to the public as a CPA, she implicitly claimed to recognize, accept, and comply with the regulations of Florida that conditioned her continued right to practice as a CPA. That was not the case, and her implicit representation is beyond any First Amendment protection.

Petitioner's commercial speech also may be regulated by the state as a result of the state's substantial interests in ensuring conformity to high standards of practice and in drawing, for the public, a bright-line distinction between those who are willing to comply with applicable standards and those who are not. Those interests are directly advanced by regulating use of the "CPA" designation, and the state should be permitted to curtail the use of that designation by those who are not willing to conform to professional standards specifically applicable to those holding themselves out as CPAs.

ARGUMENT

I. HOLDING ONESELF OUT AS A CPA, WHILE KNOWINGLY REFUSING TO COMPLY WITH THE REGULATIONS SPECIFICALLY APPLICABLE THERETO, IS FALSE AND MISLEADING AND NOT PROTECTED BY THE FIRST AMENDMENT.

The designation "CPA" that is the crux of this case has accumulated over time certain well-understood connotations. Among the most important of those is the implied assertion that the holder of the designation possesses an established

level of professional competence and adheres to a system of professional regulation designed to ensure continued high standards of proficiency and ethics. Where, as here, a CPA refuses to adhere to that ethical regime, her promotional use of the CPA credential invites the public to draw an inference that is not true; her use of the credential in this way and to this extent is misleading.

That misleading use is all that Florida denied to Petitioner. This case, therefore, presents neither a total ban on the use of the CPA credential because of its potential for misuse nor a facial challenge to Florida's regulation in all of its possible applications. It is a challenge narrowly to Florida's power to curtail the misleading use of a content-laden credential by one who is actually using it in that misleading way. This authority to regulate with particularity demonstrably misleading commercial speech is well within the constitutional power of the state, as the Court's authorities have defined that power. *See, e.g., Peel v. Attorney Registration & Disciplinary Comm'n of Illinois*, 496 U.S. 91 (1990); *In re R.M.J.*, 455 U.S. 191, 207 (1982); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 562 (1980); *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

This Court has explicitly noted "the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Central Hudson*, 447 U.S. at 562, *quoting Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978). The Court has recognized, accordingly, that, "The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Central Hudson*, 447 U.S. at 562-63.

A well recognized qualification on the First Amendment right to disseminate commercial information involves speech

that is false and misleading. The Court has unequivocally and consistently held that "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity." *Central Hudson*, 447 U.S. at 564; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). As the Court stated in *Virginia State Bd. of Pharmacy*:

> Obviously, much commercial speech is not probably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.

425 U.S. at 771. When faced with false and misleading speech, a state may constitutionally impose a total ban. The state "may ban forms of communication more likely to deceive the public than to inform it." *Central Hudson*, 447 U.S. at 563; *Friedman v. Rogers*, 440 U.S. 1, 13, 15-16 (1979).

At issue in the present case is *not* such a "total ban." Petitioner is welcome to advertise herself as a "CPA." What is at issue here is whether she may advertise herself as a CPA while, at the same time, failing to recognize the authority of—indeed essentially disavowing—state regulations that govern the licensure and practice of CPAs. The Board and the Florida First District Court of Appeal ruled that she may not. Under the Court's cases, it is clear that the First Amendment does not entitle an accountant to promote herself to the public as a duly licensed and authorized CPA, while, at the same time, she deliberately declines to subject her practice to the professional regulations applicable to CPAs. Her behavior in this respect renders her implicit representation false and misleading, and unprotected by the First Amendment.

Certainly the commonsense interpretation by the public of a professional credential—whether it be "CPA," "M.D.," "D.D.S.," "Attorney-at-Law," or other such professional designation—is that the professional has both met the threshold requirements to practice and is subject to the regulatory protections uniformly applied to members of that profession. The relevant information that makes a contribution to informed consumer decision-making includes the implied assertion that the professional adheres to the standards her profession proclaims. Such professional designations, and the ability of the public to place reliance upon them, are thus fundamental to the purposes they seek to fulfill: communication of pertinent information about a professional to potential users of her services, and protection of the public as to the professional's practice in a field that is, by its nature, beyond the knowledge, skill, and understanding of the average person.

Beyond a commonsense understanding, the public may also be expected to be aware that state law, such as the Florida law applicable here, explicitly subjects those practicing in regulated professions not only to licensure requirements, but to ongoing regulation. In the case of CPAs, those regulations require adherence to standards of independence, integrity, and objectivity, certain restrictions on fee arrangements, participation in continuing education programs, and other competence and technical standards. *See, e.g.*, Fla. Admin. Code Ann. rs. 61H1-21, 61H1-22; Fla. Stat. chs. 473.312, 473.319, 473.3205. Holding oneself out as a CPA implicitly represents adherence to these ongoing regulations, because such adherence is what the law specifically requires.

Without specifically addressing the issue, members of the Court have assumed, as the underpinning of earlier decisions, that advertisement as a licensed professional carries with it this suggestion of compliance with ongoing regulatory responsibilities. Justice Stevens, writing the plurality opinion in *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91 (1990), examined a dictionary definition of the word

"certificate" for the "common understanding" that certification implies that one "has attained professional standing in a given field *and* may officially practice or hold a position in that field." *Id.* at 104, *quoting Webster's Third New International Dictionary* at 367 (1986 ed.) (emphasis deleted and added). Justice O'Connor, while addressing a separate subject in *Peel*, referred to it as "common knowledge" that "States police the ethical standards of the profession." *Id.* at 123-24 (O'Connor, J., dissenting). Justice Marshall, concurring in that same case, referred to a definition of "certified public accountant" as an accountant "in professional public practice who has met the requirements of a state law." *Id.* at 113 (Marshall, J., concurring). Indeed, it was the existence of "high professional standards" that were "guaranteed by the close regulation to which pharmacists in Virginia are subject" that the Court said it relied upon when it first extended constitutional protection to the commercial speech of professionals. *Virginia State Bd. of Pharmacy*, 425 U.S. at 768; *see Bates v. State Bar of Arizona*, 433 U.S. 350, 365 (1977).

The basic point is that one who holds herself out as a member of a regulated profession, as a matter of common understanding and as a matter of law, implicitly represents that she is subject to, and in compliance with, ongoing state regulatory requirements and, when that is not so, her representation is deceptive. Where, as here, the possibility of such deception is self-evident, the state need not survey the public for factual support in order to sustain a curtailment of the deceptive speech. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 652-53 (1985); *Accountant's Soc'y of Virginia v. Bowman*, 860 F. 2d 602, 606 (4th Cir. 1988) ("the Board was not required to make an elaborate evidentiary showing at trial in order to establish the misleading nature" of the use of the appellation "public accountant").

But while such a factual record is unnecessary, it is present here. There is specific evidence in this case, found by the

Board to be clear and convincing, that use of "CPA" implicitly creates the expectation of conformity to ongoing accountancy regulations. Before the Board, Dean Dennison, an expert in public accounting, testified:

> In my opinion, the use of the term [CPA] implies additional competence. If the public that's out there being served identifies a service or received a service, advice, counsel, whatever, from a person who does hold themselves out as a CPA, I think they have a right to expect that they [the CPA] would be disciplined and subject to the chapters that govern any CPA that holds themselves out.
>
> If the individual totally disassociates himself, even though he may keep his credentials current, if he or she disassociates herself with the identification of a CPA and they are there doing those other business activities and the public has no reason to believe that they are in any way holding themselves out, then I think the public doesn't have the same expectation for that person who has not held themselves out as a CPA, therefore they are not expecting any more competency than anybody else, no matter what their licensure may be.

(R. 659-60.) Another witness, more representative of the public, testified that she would believe Petitioner here was performing both legal and CPA services, based on her advertisement. (R. 1228-29, J.A. 155.) The record thus bears out the understanding dictated by commonsense and by the Court's prior analysis and demonstrates the misleading nature of Petitioner's speech in this case.

All this is consistent with the strong misgivings this Court has previously expressed about the potentially misleading nature of professional "certifications," even where the professional was unquestionably in full compliance with the requirements at issue. In *Peel*, the Court wrestled with the issue whether an attorney could advertise on his letterhead

that he was "certified" as a civil trial specialist by the National Board of Trial Advocacy. 496 U.S. at 93-94. Unlike this case, there was absolutely no suggestion that the attorney was not in full compliance with applicable requirements; even so, as Justice White pointed out in dissent, "there are five Justices who believe that this particular letterhead is unprotected":

> [T]here are five Justices who believe that this particular letterhead is unprotected: Justice O'Connor, the Chief Justice, and Justice Scalia believe the letterhead is inherently misleading and hence would uphold Rule 2-105(a)(3) . . . ; at least two of us—Justice Marshall and myself—find it potentially misleading and would permit the State to ban such letterheads but only if they are not accompanied by disclaimers appropriate to avoid the danger. This letterhead does not carry such a disclaimer. The upshot is that while the State may not apply its flat ban to any and all claims of certification by attorneys, particularly those carrying disclaimers, the State should be allowed to apply its Rule to the letterhead in its present form and forbid its circulation.

Id. at 118.

Apparently what saved the "certification" on the letterhead in *Peel* was the fact that the state in that case had gone too far in enacting a "total ban." *Id.* at 111 (Marshall, J., concurring). There is no "total ban" at issue here. Petitioner is welcome to use the CPA appellation if she is willing to comply with state regulations applicable to those who hold themselves out as CPAs. Only her unwillingness so to comply drives her to resort to the First Amendment.

This situation is analogous to that encountered by the Fourth Circuit in *Accountant's Soc'y of Virginia v. Bowman*, 860 F.2d 602 (4th Cir. 1988). In that case, the Fourth Circuit addressed the constitutionality of a Virginia statute which,

like the Florida statute here, imposed restrictions on holding oneself out as a certified public accountant. Similar to Petitioner, a group of accountants who had not met the requirements of licensure argued that the statute unconstitutionally abridged their First Amendment freedom of speech. The Fourth Circuit disagreed. Relying upon precedent of this Court, the Fourth Circuit explained:

> The state has an interest in assuring the public that only persons who have demonstrated their qualifications as certified public accountants and received a license can hold themselves out as certified public accountants. The Supreme Court has held that "advertising for professional services" may be prohibited "when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse."

Id. at 605, *quoting In re R.M.J.*, 455 U.S. 191, 203 (1982).

The Institute is well aware of the argument made by the Alliance of Practicing Certified Public Accountants (the "Alliance") and certain others, as *amici curiae*, that there allegedly is nothing misleading in Petitioner's suggestion that she is "subject to the Board's regulatory oversight" because such a statement is supposedly verifiable and correct. They argue that "if consumers assume Mrs. Ibanez is subject to the Board's regulatory oversight, they will be correct." (Alliance Br. at 22.) What these *amici* fail to make clear, however, is that, while she may admit to being "subject to" regulatory oversight, Petitioner also takes the position that she does not have to comply with it. And, no matter how strenuously these *amici* attempt to defend it, it is inherently misleading to advertise oneself as "regulated" when, in fact, one also takes the position that she need not comply with the regulations.

In sum, although she was in knowing disregard of regulations applicable to CPAs, Petitioner nevertheless, by offering

accounting services and displaying the CPA credential, represented to the public that she was a CPA who had agreed to be subject to the state's rules applicable thereto. That was false and misleading. Her ability to hold herself out as a regulated professional, while simultaneously taking the position that she need not comply with applicable regulations, is not, and should not be, protected by the First Amendment.

II. THE STATE HAS A SUBSTANTIAL INTEREST THAT IS DIRECTLY ADVANCED BY THE LIMITATION OF THE "CPA" DESIGNATION TO THOSE WILLING TO CONFORM TO PROFESSIONAL REGULATIONS.

Beyond its interest in prohibiting the false and misleading use of the CPA appellation, the state has further interests served by the limitation upon those who may hold themselves out as CPAs: ensuring compliance with its accountancy regulations while drawing a bright-line distinction, clear to the public, between those accountants who are subject to the state's regulatory regime and those who are not. These interests have led to regulatory regimes that rely upon the "holding out" mechanism to distinguish among those who will be subject to regulation and those who will not.[2] The Institute's Code of Professional Conduct similarly utilizes such a provision.[3] Absent a restraint on the use of "CPA," regulatory regimes would suffer and the potential for confusion to the public would be great. The state's interest is therefore substantial and is directly advanced by the regulation at issue, which is in reasonable proportion to the interest served.

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[2] *See, e.g.*, Mass. Gen. Laws Ann. ch. 112, §§ 87A-D (West 1991); N.D. Cent. Code § 43-02.2 *et seq.* (1993); Tex. Rev. Civ. Stat. Ann. art. 41a-1 *et seq.* (Supp. 1993).

[3] *See* Code of Professional Conduct of the American Institute of Certified Public Accountants, Rule 92.09 (1993).

In *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, the Court set forth a three-factor test, since held applicable to accountancy regulations, governing the permissibility of state restraints on truthful commercial speech. 447 U.S. 557, 566 (1980); *see Edenfield v. Fane*, 113 S. Ct. 1792, 1798 (1993). That test presently involves the assessment whether: (1) the asserted governmental interest is substantial; (2) the regulation directly advances the governmental interest asserted; and (3) the regulation is in reasonable proportion to the interest served. *Central Hudson*, 447 U.S. at 566; *see Board of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989). Assessment of those factors here demonstrates the constitutional permissibility of the Board's limitation on who may hold themselves out as CPAs.

As to the first factor, the Court has already recognized the substantial interest of the state in regulating the practice of public accountancy and in ensuring conformity to the highest standards of ethics and professionalism. More than once, the Court has emphasized the overriding importance to the public and financial markets that "the accountant maintain total independence from the client at all times" and the extent to which the practice of public accountancy "requires complete fidelity to the public trust." *United States v. Arthur Young & Co.*, 465 U.S. 805, 818 (1984); *see Fane*, 113 S. Ct. at 1800.

The Court has emphasized generally "the State's important interests in maintaining standards of ethical conduct in the licensed professions." *Fane*, 113 S. Ct. at 1800; *see Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978). Maintaining standards of ethical conduct, and, in particular, ensuring "total independence" and "complete fidelity to the public trust," are the fundamental premises underlying state accountancy regulations. *See, e.g.*, Fla. Stat. ch. 473.301 ("The Legislature recognizes . . . [the] public need for independent and objective public accountants and that it is necessary to regulate the practice of public accounting"). As the Court found

just last term, a board of accountancy's interest in ensuring compliance with these standards, under the *Central Hudson* test, is "substantial":

> With regard to CPAs, we have observed that they must "maintain total independence" and act with "complete fidelity to the public trust" when serving as independent auditors. *United States v. Arthur Young & Co.*, 465 U.S. 805, 818, 104 S.Ct. 1495, 1503, 79 L.Ed.2d 826 (1984). Although the State's interest in obscuring the commercial nature of public accounting practice is open to doubt, *see Bates v. Arizona State Bar Assn.*, 433 U.S., at 369-71, 97 S.Ct., at 2701-2703, the Board's asserted interest in maintaining CPA independence and ensuring against conflicts of interest is not. We acknowledge that this interest is substantial.

Fane, 113 S. Ct. at 1800.

The protection of this substantial interest in maintaining standards of professional skill and ethical behavior gives rise to a second, related substantial interest which the state is entitled to protect: the undiluted and consistent character of the CPA designation as a hallmark distinguishing those practitioners who adhere to those standards from those who do not.

The plurality opinion in *Peel* is instructive on this point. There, the Justices joining in the opinion recognized that some consumers would draw inferences about Peel's qualifications from the certification he used, but concluded that the certification was not inherently misleading because the organization conferring it was demonstrably genuine and its uniform standards were demonstrably rigorous and, in fact, complied with. The opinion noted that the certification's implied representation of its possessor's qualifications was, "[m]uch like a trademark, . . . measured by the quality of the organization for which it stands," and that quality was in turn inferable from "an evaluation of its rigorous requirements." 496 U.S. at 102.

So here. The CPA designation is conferred by state authority upon those who adhere to its uniformly applied, consistently maintained, ascertainably rigorous standards. The strength of that certification, also like a trademark, would be diluted not only by the absence of rigorous standards for its use in the first place, but also by an inability to police its use and confine that use to those who meet the rigorous standards. If Peel could have used his NBTA certification, backed as it was by rigorous standards, without complying with them, his case would have taken on a quite different complexion.

Nor does it matter that Petitioner, at the moment, apparently chooses not to offer the attest services which are central to the CPA's role and most conspicuously implicate the duties of independence and fidelity to the public trust. This is true for at least three reasons. First, other obligations properly within the ambit of state regulation—for example, the duty to avoid conflicts of interest—subsist outside the attest context and have been recognized as substantial. *Fane*, 113 S. Ct. at 1800. Second, as a matter of law, the Court has recognized that the idiosyncracies of a litigant's particular situation do not defeat the state's interest. Last term, in its most recent commercial speech case, the Court held that, given the state's " 'strong interest in adopting and enforcing rules of conduct designed to protect the public' . . . the State was entitled to protect its interest by applying a prophylactic rule to those circumstances generally." *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2706 (1993), *quoting Ohralik*, 436 U.S. at 464. Similarly here; Florida's strong interests in protecting professional standards and the CPA designation as a badge of adherence to them are unaffected by the present specifics of Petitioner's practice.

Third, and most fundamentally, it is necessary for the state to protect the undiluted quality of the CPA hallmark—even when used by non-attesting practitioners—because it protects the profession's single reputation for skill, independence, and objectivity. That reputation makes it possible for CPAs to pro-

vide a differentiated service in the marketplace for financial services and it is in the public's interest that this alternative be both available and distinctively communicated to consumers.

The distinctiveness and integrity of the CPA hallmark is instrumental in procuring adherence to the regime of professional standards enacted for the public's benefit. It is likely that the willingness of many accountants to subject themselves to the rigorous regulations governing the practice of public accountancy arises out of the resulting ability to employ the CPA hallmark and to benefit from the reputation for skill and ethics that it communicates. When they use that hallmark, accountants hold themselves out to the public as persons who not only perform accounting functions, but also satisfy the specified standards of practice and who maintain fidelity to the ongoing responsibilities that accompany that professional designation. The public, in turn, can be confident that, if one engages a CPA, he or she is obtaining the services of an accountant who is committed to standards embodying the highest levels of competence, ethics, and professional conduct as defined by the state.

If a state may not limit those who may hold themselves out as CPAs to those who comply with applicable regulations, the foundations of this regulatory regime largely collapse. The value of the CPA hallmark would be seriously impaired. There would be a correspondingly diminished incentive to comply with ongoing professional requirements that impose cost and burden on the professional. There would be reduced incentive to conform to ethical standards; there would be reduced incentive to participate in continuing professional education programs; there would be reduced incentive to open one's practice to periodic inspection by competitors through the "peer review" process implemented by the profession. If an accountant could, without compliance, hold herself out as a "CPA," there would be reduced incentive to subject oneself to any of this.

The result, of course, would be the elimination of the centerpiece of the regulatory regime and the diminishing of fidelity to the standards of the profession (as we see in this case). That outcome would also eliminate the bright-line distinction, readily available to the public, differentiating those who are committed to compliance with applicable regulations from those who are not, and separating those who may conscript for their commercial use the profession's reputation for ethical behavior from those who cannot. While the profit-maximizing strategies of some accountants might thereby be served, there is surely one group that would not be: the public.

Florida, therefore, has a substantial interest both in upholding the standards of proficiency and ethics of the CPA profession and in protecting the hallmark of those qualities that it confers from dilution and misuse. Both of these interests are directly advanced by a regulation that curtails the ability of a non-complying practitioner to promote her business by use of the CPA designation. The second factor of *Central Hudson* is thus amply satisfied here.

As to the final factor of *Central Hudson*, the restraint upon use of "CPA" is narrowly drawn to be in reasonable proportion to the substantial interest served. 447 U.S. at 566; *see Fox*, 492 U.S. at 480. As the Court has held, laws restricting commercial speech, "unlike laws burdening other forms of protected expression, need only be tailored in a reasonable manner to serve a substantial state interest in order to survive First Amendment scrutiny." *Fane*, 113 S. Ct. at 1798; *see Fox*, 492 U.S. at 480. In applying this standard, the Court has been especially sensitive to the particular risks attendant to advertising for professional services:

> The public's comparative lack of knowledge, the limited ability of the professions to police themselves, and the absence of any standardization in the "product" renders advertising for professional services especially suscep-

tible to abuses that States have a legitimate interest in controlling.

In re R.M.J., 455 U.S. 191, 202 (1982); *see also Virginia State Bd. of Pharmacy*, 425 U.S. at 773. The limitation here is a precise and reasonable intrusion upon the speech of those practicing public accountancy aimed directly at protecting interests the state is entitled to advance. The "holding out" mechanism is meant to sort out accurately who does and who does not submit to accountancy regulations and to inform the public reliably about the difference.

The narrowness of the limitation at issue is illustrated by what it does not seek to do, particularly when it is contrasted with commercial speech restraints that have been addressed by the Court. The limitation here does not, for example, place a "total ban" on the commercial speech at issue. *E.g.*, *Fane*, 113 S. Ct. at 1800; *Peel*, 496 U.S. at 111; *In re R.M.J.*, 455 U.S. at 202; *Central Hudson*, 447 U.S. at 562. The limitation here does not seek to discriminate between different forms of speech based upon their substantive content. *E.g.*, *Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1517 (1993). The limitation here does not seek to curtail a form of speech where the proper remedy is "more speech." *E.g.*, *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 97 (1977). The limitation here does not seek to curtail speech based on the speech's "primary effect"—the effect of the speech when those who receive the information act upon it. *E.g.*, *id.*; *Virginia State Bd. of Pharmacy*, 425 U.S. at 766-70. The limitation here does not seek to protect the public by keeping it in ignorance. *E.g.*, *Bates*, 433 U.S. at 365; *Virginia State Bd. of Pharmacy*, 425 U.S. at 769.

Rather, the limitation at issue here—like truth-in-labeling—seeks only to enhance the conveyance of meaningful and consistent information to the public as to what the designation "CPA" does, and does not, mean. It respects the public's right to make its own informed decision, and seeks only to establish a uniform nomenclature so the public can make just such a decision.

The regulations at issue are thus directed to substantial interests that the state is entitled to protect, specifically advance those interests, are narrowly drawn, studiously avoid the impermissible forms of restraint the Court has historically invalidated, and arise in a context which, the Court has recognized, is particularly vulnerable to the risk of public confusion. Florida's restriction of the right to hold oneself out as a "CPA" to those willing to comply with its regulatory requirements governing the practice of public accountancy should therefore be upheld.

CONCLUSION

For the foregoing reasons, the American Institute of Certified Public Accountants respectfully requests that the judgment of the First District Court of Appeal of Florida be affirmed.

Respectfully submitted,

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